

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2343

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P/S

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GER-RO-MAR, INC., a corporation, d/b/a SYMBRA'ETTE, and
CARL G. SIMONSEN, individually and as President of
GER-RO-MAR, INC.,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL TRADE COMMISSION

JOINT APPENDIX

CALVIN J. COLLIER
General Counsel

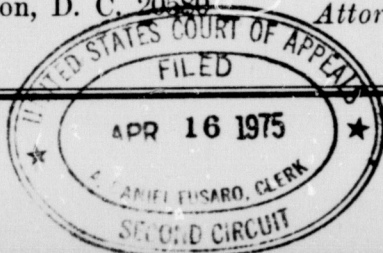
GERALD HARWOOD
Assistant General Counsel

W. BALDWIN OGDEN
Attorney for Respondent
Federal Trade Commission
Washington, D. C. 20580

CLIFTON H. STANNAGE
350 Fifth Avenue
New York, New York 10001
(212) 524-0830

JACK M. WISEMAN
2084 Alameda Way
San Jose, California 95126
(408) 248-0893

Attorneys for Petitioners



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Complaint

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

8872

In the Matter of GER-RO-MAR, INC., a corporation, d/b/a Symbra'ette, and CARL G. SIMONSEN, individually and as President of Ger-Ro-Mar, Inc.

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C., Section 41 et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ger-Ro-Mar, Inc., a corporation, d/b/a Symbra'ette, and Carl G. Simonsen, individually and as President of Ger-Ro-Mar, Inc., more particularly described and referred to herein-after as Respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges as follows:

Paragraph One: Respondent Ger-Ro-Mar, Inc. (hereinafter sometimes referred to as Ger-Ro-Mar or Symbra'ette) is a corporation organized in 1963, and is existing and doing business under and by virtue of the laws of the State of California. Respondent Ger-Ro-Mar maintains its home office and principal place of business at 460 Meridian Avenue, San Jose, California.

Complaint

Respondent Carl G. Simonsen is an individual and is President and a director of Ger-Ro-Mar. Respondent Simonsen founded Ger-Ro-Mar, instituted the Ger-Ro-Mar marketing program and distribution policies, and has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of Ger-Ro-Mar. His office address is the same as that of Ger-Ro-Mar.

Symbra'ette is a name registered and copyrighted to Ger-Ro-Mar, under which said Respondent sometimes does business, under which many of its products are sold, under which the activities hereinafter more fully described are sometimes known, and under which hereinafter the acts and practices of Ger-Ro-Mar may be set forth.

Paragraph Two: Ger-Ro-Mar is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, and distribution of brassieres, girdles, swimwear, wigs and lingerie to the public under the "Symbra'ette" marketing system, and is inducing, and has induced, persons to invest substantial sums of money in its multilevel marketing program as hereinafter more fully described. Ger-Ro-Mar's sales to distributors have grown from \$36,832.91 in 1965 to \$2,054,250.62 in 1969.

Paragraph Three: In the course and conduct of its business, Ger-Ro-Mar now causes, and for some time last past has caused, its products, when sold, to be shipped from its principal place of business in California to purchasers thereof located in various states of the United States, and, in the course of establishing and maintaining its multilevel

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marketing program, has transmitted and caused to be transmitted contracts, promotional material, and various business papers to persons located in various states of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Paragraph Four: Except to the extent that actual and potential competition has been lessened, hampered, restricted, and restrained by reason of practices hereinafter alleged, Ger-Ro-Mar's distributors and dealers, in the course and conduct of their business in distributing, offering for sale, and selling of Symbra'ette products, are in substantial competition in commerce with one another, and Ger-Ro-Mar and its distributors are in substantial competition in commerce with other firms or persons engaged in the manufacture or distribution of similar products.

Paragraph Five: Ger-Ro-Mar has formulated a distribution system involving distributors at wholesale and retail levels, and has published its marketing plan or distribution policies which are set forth in Symbra'ette's price lists, discount schedules, marketing manuals, sales bulletins, order forms, pamphlets, and other materials and literature. To effectuate and carry out the aforesaid distribution system, policies, or plan, Ger-Ro-Mar and its distributors have entered into certain contracts, agreements, combinations, or common understandings hereafter more fully described.

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Paragraph Six: The Symbra'ette marketing plan is a distribution network which allows a potential distributor to enter at any one of three levels, i.e., "Key Distributor," "Senior Key," or "Supervisor," and eventually qualify at a fourth and fifth level, that of District Manager and Regional Manager. One enters into the Symbra'ette distribution system by investing a sum of money for the purchase of merchandise from Symbra'ette or its distributors. All distributors, except for the Key Distributors (hereinafter sometimes referred to as Keys), buy directly from Symbra'ette. A distributor's gross profit is the difference between the price or prices he pays for Symbra'ette products and the price at which he sells them, plus overrides on sales made by those people he has recruited to sell, and overrides on sales made by recruits' recruits ad infinitum.

a. Key Distributor—Key Distributors purchase their products for resale at 35% off the retail list price, known by Symbra'ette as the retail purchase volume (or R.P.V.). A Key must purchase his goods from his sponsor. Monthly minimum purchases of \$100 in terms of retail list price are required, as well as an initial investment of \$300 (retail list price) worth of merchandise.

b. Senior Key—Senior Keys purchase their needs directly from Symbra'ette at 40% off the retail list price for sale to Keys or the general public. There is no limit to the number of distributors who may be recruited, nor is there a limit as to the size of any distributor's organization. A Senior Key's organization includes all persons whom he supplies with products.

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A Senior Key receives no override, but earns a 5% profit on sales to his Key Distributors.

Individuals who desire to start as Senior Keys must purchase an initial inventory of \$1,000 in terms of retail list prices, and must maintain a monthly purchase volume of \$500 (retail list price) worth of merchandise.

c. Supervisor—Supervisors purchase their products for resale at 45% off the retail list price, and purchase from Symbra'ette. A Supervisor's organization includes all persons whom he supplies with products, whom he recruits, or upon whose purchases he receives an override.

An individual who desires to start as a Supervisor is required to purchase an initial inventory valued at \$3,000, and his organization must maintain a monthly inventory purchase volume of \$1,500. A Supervisor earns a 5% override on purchases made by his Senior Keys and a 10% profit on purchases made by his Key Distributors. He also receives a 2% override on purchases made by his directly recruited Supervisor's group.

d. District Manager—A District Manager purchases products from Symbra'ette at a 50% discount from suggested resale price.

A District Manager's personal group includes his directly sponsored Supervisors' entire groups, and his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

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A District Manager and his organization must initially purchase a dollar volume of \$7,500 inventory for one month and must maintain a monthly purchase volume of \$3,000. One cannot "begin" as a District Manager, but, rather, must "work" his way to this position, by having recruited at least 5 people who reach Senior Key or Supervisor positions in his organization.

A District Manager earns a 15% profit on purchases of his Keys, 10% override on purchases of his Senior Keys, 5% override on his Supervisors' purchases, 3% override on the purchases of his directly sponsored District Manager's sales group, and 1% on the purchases of indirectly sponsored District Manager's personal group. He also earns a cash car allowance of \$150 on R.P.V. of \$7,500 per month of his personal group.

e. Regional Manager:

The highest level one can reach in Symbra'ette is that of a Regional Manager. A Regional Manager buys his products at a 55% discount from Symbra'ette.

The personal group of a Regional Manager includes his directly sponsored District Managers' entire groups, his directly sponsored Supervisors' entire groups, his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

A District Manager's personal group R.P.V. must reach \$25,000 in one month in order to entitle that District Manager to ascend to the position of Regional

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Manager. Thereafter, a monthly minimum R.P.V. of \$12,500 is required.

A Regional Manager earns a 20% profit on purchases of his Keys, a 15% override on his Senior Keys' purchases, a 10% override on his Supervisors' purchases, a 5% override on his directly sponsored District Managers' purchases, 1% on his indirectly sponsored District Managers' purchases, 3% on his directly sponsored Regional Manager's personal group purchases and 1% on his indirect Regional Manager's personal group purchases. He also earns a \$200 cash car allowance on \$17,500 monthly personal group R.P.V.

Paragraph Seven: Pursuant to and in furtherance and effectuation of the aforesaid agreements and planned common courses of action, Ger-Ro-Mar has:

(A) required all distributors to adhere to the Symbra'ette marketing plan, and all distributors have actually or impliedly agreed to abide by all rules and regulations established by Symbra'ette in furtherance of the marketing plan, and to abide by all amendments or changes.

(B) entered into contracts, agreements, combinations, or understandings with each of its distributors whereby said distributors agree to maintain the resale prices established and set forth by the company, notwithstanding that some of such distributors are located in states which do not have fair trade laws.

(C) entered into contracts, agreements, combinations, or understandings with each of its distributors where-

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by said distributors are restricted as to their suppliers and customers. More specifically:

- 1) Distributors agree to purchase merchandise only from Respondent or, in the case of a Key Distributor, only from his sponsor, i.e., the distributor who introduced him to Symbra'ette
- 2) Distributors agree to restrict the retail sales and display of Symbra'ette products through authorized retail channels, i.e., direct home sales, home service routes, exclusive boutiques or similar establishments where custom fitting is done, and establishments where no competitive line is sold. Commercial retail markets are not authorized.
- 3) Distributors agree that each customer belongs to the distributor who originally acquired that customer.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended, by Respondents.

Paragraph Eight: The allegations of Paragraphs One through Seven are incorporated by reference as if fully set forth verbatim.

Paragraph Nine: Ger-Ro-Mar's merchandising program is in the nature of a lottery. A lottery involves three elements. These are: 1) a prize, 2) according to chance, and 3) for a consideration.

Open-ended multilevel marketing plans offer as a prize the profits, commissions and/or overrides accruing to the

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recruiter on sales made to the distributors whom he recruits, sales made to their recruits, etc.

Mathematical laws of geometric progression require that saturation must ultimately occur. The chance aspect of open-ended, multilevel marketing programs is that the "prizes" are dependent upon factors outside of the control of individual participants, such as the number of prize participants in the program, the time at which an individual enters the program, the degree of market saturation which has already occurred when an individual enters the program and the prospects of that individual's recruits of continuing the recruiting chain.

The consideration is the money paid to Ger-Ro-Mar by distributors for the purchase of products for resale.

Sales methods involving the use of lottery devices in the sale and distribution of merchandise to the public are in contravention of the established public policy of the United States, are to the prejudice of the public, and constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. Respondents' open-ended multilevel marketing plan is in the nature of a lottery, and therefore constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

COUNT II

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by Respondents.

Paragraph Ten: The allegations of Paragraphs One through Seven are incorporated by reference in Count I as if fully set forth verbatim.

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Paragraph Eleven: Ger-Ro-Mar's open-ended multilevel marketing program holds out to prospective distributors the lure of making large sums of money, through a virtually endless chain of recruiting additional participants and from various commissions, overrides or other compensation on the sales and/or further recruiting activities of their own recruited distributors or distributors in their organizations.

The operation of the program contemplates geometrical increases in the number of distributors to insure participants the earnings represented and impliedly realizable from the program. However, because the over-all number of potential participants remains relatively constant, the participants may be, and in a substantial number of instances will be, unable to find additional investors in a given community or geographical area by the time they enter Respondents' merchandising program. This comes about because the recruiting of participants who came into the program at an earlier stage may have already exhausted the number of prospective participants.

Respondents represent in their promotional material that each distributor can recruit five persons per month. Based upon a geometrical progression of five additional recruits per month per distributor, the number of additional participants in each distributor's organization at each monthly stage of growth would increase at such a rate that at the end of twelve months (giving effect to the continuing process of recruitment as contemplated under Respondents' marketing plan) there would be an aggregate in excess of 244,000,000 participants in the marketing organization.

Complaint

Ger-Ro-Mar's recruitment program must ultimately collapse when the number of potentially available distributors which can be recruited to serve a particular area is exhausted, and/or the distributors theretofore recruited have so saturated the area with distributors as to render it virtually impossible to recruit any more. Consequently, while participants entering the program early may realize profits through recruiting, those coming in at later stages will find recruiting more difficult and ultimately impossible, resulting in the diminishment or lack of profits, based on recruiting, of the later entrants.

For the foregoing reasons, Ger-Ro-Mar's open-ended multilevel merchandising program is operated in such a manner that the realization of financial gains is often predicated upon the exploitation of others who have been induced to participate therein, and who have virtually no chance of receiving the kind of return on their investment implicit in said merchandising program. Therefore, the use by Respondents of the above-described multilevel merchandising program in connection with the sale of their merchandise was and is an unfair method of competition in commerce, and was and is an unfair and deceptive act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT III

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by Respondents.

Paragraph Twelve: The allegations of Paragraphs One through Seven are incorporated by reference in Count III as if fully set forth verbatim.

Complaint

Paragraph Thirteen: In the course and conduct of its business, and for the purposes of inducing the participation by others in its marketing program and the sale of its merchandise, by and through statements and oral representations, and by means of brochures and other written material, Ger-Ro-Mar and its representatives represent, and have represented, directly or by implication, that:

1. It is not difficult for participants to ascend to a higher level of distribution within the marketing chain so as to increase their chances of recouping their investments and of earning the represented profits.

2. All participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings.

3. The marketing program is commercially feasible for all participants, and the supply of available entrants and investors is virtually inexhaustible.

Paragraph Fourteen: In truth and in fact,

1. It is difficult for participants to ascend to a higher level of distribution within the marketing chain so as to increase their chances of recouping their investments and of earning the profits represented by Respondents in their promotional and other materials.

2. All participants in Respondents' marketing program do not have the potentiality and reasonable expectancy of receiving large profits or earnings.

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3. Respondents' marketing program is not commercially feasible for all participants, and, by the very nature of the said marketing plan as herein described, the supply of available entrants and investors must ultimately be exhausted.

Therefore, the statements and representations as set forth in Paragraphs Twelve and Thirteen have been, and are, false, misleading and deceptive, and constitute unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT IV

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by Respondents.

Paragraph Fifteen: The allegations of Paragraphs One through Seven are incorporated by reference in Count IV as if fully set forth verbatim.

Paragraph Sixteen: The acts, practices, and methods of competition engaged in, followed, pursued, or adopted by Respondents, and the combinations, conspiracies, agreements, or common understandings entered into or reached between and among the Respondents and others not parties hereto are unfair methods of competition and are to the prejudice of the public because of their dangerous tendency toward, and the actual practice of, fixing, maintaining, or otherwise controlling the prices at which the Symbra'ette products are resold, in both the wholesale and retail markets, and fixing, maintaining, or otherwise controlling the

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various fees, bonuses, rebates, or overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors.

Said acts, practices, and methods of competition constitute an unreasonable restraint of trade and an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT V

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by Respondents.

Paragraph Seventeen: The allegations of Paragraphs One through Seven are incorporated by reference in Count V as if fully set forth verbatim.

Paragraph Eighteen: The acts, practices, and methods of competition engaged in, followed, pursued, or adopted by Respondents, and the combinations, conspiracies, agreements, or common understandings entered into or reached between and among the Respondents and their distributors hereto constitute unfair methods of competition in that they result in, or have a dangerous tendency toward restricting the customers to whom the Symbra'ette distributors may resell their products; restricting the source of supply from which distributors may purchase their products; and restricting their distributors to reselling their products through specified retail channels.

Said acts, practices, and methods of competition constitute an unreasonable restraint of trade and an unfair method of competition in commerce within the intent and

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meaning of Section 5 of the Federal Trade Commission Act, as amended.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of November, A.D., 1971, issues its complaint against said Respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 17th day of January A.D. 1972, at 10 A.M. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Bldg., 11th & Pennsylvania Avenue, N. W., Washington, D. C. 20580 as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement

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that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Ger-Ro-Mar, Inc., doing business as Symbra'ette, and Carl G. Simonsen might be inadequate fully to protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

IT IS ORDERED that respondents Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, and its officers, and Carl G. Simonsen, individually and as an officer of said

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corporation, and respondents' agents, representatives, successors and assigns, employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale, or distribution of brassieres, girdles, lingerie, wigs, or of other products or of distributorships of franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Operating or participating, directly or indirectly, in the operation of any open ended, multilevel (pyramid) marketing program wherein the financial gains to the participants are dependent in any manner upon the continued recruitment of other participants.

2. Offering to pay, paying, or authorizing payment of any bonus, override, commission, cross-commission, discount, rebate, dividend, or other consideration to any person, firm, or corporation in connection with the sale of any product or service unless such person, firm, or corporation performs a bona fide and essential supervisory, distributive, selling, or soliciting function in the sale and delivery of such products to the ultimate consumer.

3. Using any marketing program:

- (a) Wherein any finders' fee, bonus, override, commission, cross-commission, discount, rebate, dividend, or other compensation or profit inuring to participants therein is dependent on the element of chance dominating over the skill or judgment of the participants; or

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(b) Wherein the judgment or skill exercised by the participants has no appreciable effect upon any finders' fee, bonus, override, commission, cross-commission, discount, rebate, dividend, or other compensation or profits which the participants may receive; or

(c) Wherein the participants are without that degree of control over the operation of such plan that will enable them substantially to affect the amount of any finders' fee, bonus, override, commission, cross-commission, discount, rebate, dividend, or other compensation or profit which they may receive or be entitled to receive.

4. Representing, directly or by implication, that the supply of available participants in respondents' marketing program is inexhaustible; or misrepresenting, in any manner, the availability of such participants.

5. Representing, directly or by implication, that respondents' marketing program, or any other sales program which respondents may organize, can be successful for each participant.

6. Representing, directly or by implication, that participants in respondents' marketing program will earn or receive any stated or gross or net amounts; or representing, in any manner, the past earnings of participants, unless, in fact, the past earnings of a substantial number of participants in the community or geographical area in which such representation is made, have been achieved as represented, and that the representation accurately reflects those aver-

Complaint

age earnings under circumstances similar to those of the participant, or prospective participant, to whom the representation is made.

7. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor which may have the effect of, or does:

(a) Fix, establish, or maintain the prices upon which such goods or commodities may be resold, except that in those states having Fair Trade Statutes, respondents may maintain and enforce any contract, understanding, or agreement which establishes or maintains the prices upon which their goods or commodities may be resold, pursuant to the provisions of the aforesaid Fair Trade Statutes.

(b) Require any distributor to enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices upon which such goods or commodities may be resold, except that in those states having Fair Trade Statutes, respondents may require any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which establishes or maintains the prices upon which such goods or commodities may be resold pursuant to the provisions of the aforesaid Fair Trade Statutes.

(c) Prevent any distributor, by contract or otherwise, from selling his merchandise to a buyer under such terms and conditions to which said distributor

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and buyer may mutually agree, except that, in those states having Fair Trade Statutes, respondents may maintain and enforce any contract, agreement, or understanding which establishes or maintains the prices upon which said goods or commodities may be resold, pursuant to the provisions of the aforesaid Fair Trade Statutes.

(d) Require any person to enter into a contract, agreement, understanding, marketing system, or course of conduct pursuant to which said distributor is to refrain from selling any merchandise in any quantity to any specified person, class of persons, business, or class of businesses.

8. Engaging, either as part of any contract, agreement, understanding, or course of conduct with any distributor or dealer of any such goods or commodities, or individually and unilaterally, in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product price list, order form, report form, or promotional material which employs resale prices for such goods or commodities without stating clearly and visibly in conjunction therewith the following statement:

"The prices quoted herein are suggested prices only for non-fair trade states—Symbra'ette Distributors are free to determine their own resale prices, except that, in those states having Fair Trade Laws, Symbra'ette Distributors are to retail the merchandise at those

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prices established by the company in accordance with the said Fair Trade Statutes."

(b) Publishing or distributing, directly or indirectly, any sales manual or instructional material which employs sample resale prices for such goods or commodities without stating clearly and visibly in conjunction therewith that said prices at which such goods or commodities may be resold are not binding upon the distributor, except that, in those states having Fair Trade Statutes, the company's resale prices are to be binding upon the distributor in accordance with said Fair Trade Statutes.

9. Failing to deliver a copy of this order to cease and desist to all present and future distributors, salesmen, or other persons engaged in the sale of respondents' products, services, or merchandising programs, and to secure from such distributors, salesmen, or other persons a signed statement acknowledging receipt of this order.

It is further ordered that respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered that the respondent corporation shall, forthwith, distribute a copy of this order to each of its operating divisions. It is further ordered that the respondents herein shall within 60 days after service upon them of this order file with the Commission a report, in

Complaint

writing, setting forth in detail the manner and form in which they have complied with the order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this 24th day of November A.D., 1971.

By the Commission.

CHARLES A. TOBIN,
Secretary.

23a

Stipulation of Facts Dated March 16, 1973
(Not Included in the Certified List)
(CX-92)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of GER-RO-MAR, INC., a corporation d/b/a SYMBRA'ETTE and CARL G. SIMONSEN, individually and as President of GER-RO-MAR, INC.	DOCKET NO. 8872
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TO: ADMINISTRATIVE LAW JUDGE DANIEL H. HANSCOM

STIPULATION OF FACTS

Complaint counsel and counsel for respondents hereby jointly set forth the relevant and material facts as to which there is no dispute. It is understood such facts are deemed to be conclusively established and will provide a record basis on which the Administrative Law Judge may file an initial decision.

I. The stipulated facts are as follows:

1. Respondent Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc. is a California corporation organized in 1963 and is existing and doing business under and by virtue of the laws of the State of California.

2. Respondents Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc. formerly maintained its home office and principal place of business at 460 Meridian Avenue, San Jose, California; and presently maintains its home office and principal place of business at 23 Janis Way, Scotts Valley, California.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMPLAINT Exhibit No. <u>92 (1)</u>
In the Matter of: <u>Ger-Ro-Mar, Inc.</u>	
Date: <u>4/4/73</u>	Witness: _____ Reporter: <u>MLP</u>

Stipulation of Facts Dated March 16, 1973

Respondent Carl G. Simonsen is an individual and is President and a director of Symbra'ette, Inc., (hereafter referred to as Symbra'ette). Respondent Simonsen founded Symbra'ette, instituted the Symbra'ette marketing program and distribution policies, and has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of Symbra'ette. His business address is the same as that of Symbra'ette.

Symbra'ette is a name registered to Symbra'ette, Inc. under which said respondent does business, under which its products are sold, under which the activities hereinafter more fully described are known, and under which hereinafter the acts and practices of Symbra'ette may be set forth.

3. Symbra'ette is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, and distribution of brassieres, girdles, swim-wear and lingerie to the public, under the "Symbra'ette" marketing system. Symbra'ette's sales to distributors have grown from \$36,832.91 in 1965 to \$2,054,250.62 in 1969 and in 1972 had fallen to \$1,195,465.75.

4. In the course and conduct of its business, Symbra'ette now causes, and for some time last past has caused, its products, when sold, to be shipped from its principal place of business in California to purchasers thereof located in various states of the United States, and, in the course of establishing and maintaining its marketing program, has transmitted and caused to be transmitted contracts, promotional material, and various business papers to persons located in various states of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Symbra'ette and its distributors are in substantial competition in commerce with other firms or persons engaged in the manufacture or distribution of similar products.

6. Symbra'ette has formulated a distribution system involving distributors at wholesale and retail levels, and has published Symbra'ette price lists, discount schedules, marketing manuals, sales bulletins, order forms, pamphlets, and other materials and literature. To effectuate and carry out the distribution system, policies, or plan, Symbra'ette and its distributors have entered into certain contracts, agreements hereafter more fully described.

FEDERAL TRADE COMMISSION	
Docket No. <u>88-72</u>	COMMISSION RESPONDENT Exhibit No. <u>92</u> (*)

Stipulation of Facts Dated March 16, 1973

7. Since April 1, 1972, the Symbra'ette marketing plan has been a distribution network which allows a potential distributor to enter at the lowest level as a Consultant and work up to being a Senior Consultant, a District Director and, at the fourth and highest level, a Regional Director. One enters into the Symbra'ette distribution system as a Consultant by purchasing a sample kit for \$89.95 which is refundable within 90 days. Promotion to one of the higher levels is made when a certain purchase volume is reached in a given month and such higher level is retained so long as a certain purchase volume is maintained for a calendar quarter. A distributor's gross profit is the difference between the price he pays for Symbra'ette products and the price at which he sells them with additional profit incentives.

All distributors purchase their needs directly from Symbra'ette at 35% off the suggested retail list price. Each distributor who has personal purchases of \$500 purchase volume (suggested retail price totals) in any one month receives an additional profit equal to 5% of his personal purchase volume for such month.

In addition, the distributors receive the following:

a. Consultant - A consultant purchases at the basic discount of 35%. If his personal purchase volume for any month reaches \$150, he receives an additional profit of 3% on purchases made by directly sponsored Consultants. A Consultant receives a \$15 additional profit for each month that his personal purchase volume reaches \$750. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

b. Senior Consultant - A Senior Consultant purchases at the basic discount of 35%. He receives an additional profit of 5% on his personal purchases and 5% on his directly and indirectly sponsored Consultants' purchases. If his purchase volume for any month reaches \$750 (provided his personal purchases reach \$150) he receives 2% on the purchase volume of his directly sponsored Senior Consultants. A Senior Consultant receives an additional profit of \$30 if his personal purchase volume and his Consultant's purchase volume reach \$1,500 (\$150 of which must be the personal purchases of the Senior Consultant. His purchase volume for any calendar quarter must reach \$1,500 (to include \$450 personal purchases) to maintain his Senior Consultant Level. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

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RESPONDENT	<u>(3)</u>

Stipulation of Facts Dated March 16, 1973

c. District Director - A District Director purchases at the Basic Discount of 35%. He receives an additional profit of 10% on personal purchases, 10% on directly and indirectly sponsored Consultants' purchases, and 5% on directly and indirectly sponsored Senior Consultants' purchases. If his personal volume for any month reaches \$150 and during that month his purchase volume, his Senior Consultants' purchase volume and Consultants' purchase volume reach \$2,500, he receives an additional profit of 2% on the purchase volume of that month of the directly sponsored District Directors' purchase volume and 1% on the purchase volume that month of indirectly sponsored District Directors. A District Director receives a \$100 additional profit for each month that his personal purchases reach \$150 and the total purchase volume of the District Director, his Senior Consultants and Consultants reaches \$4,500. A District Director's personal purchase volume must reach \$450 for any calendar quarter and his Senior Consultants' purchase volume and Consultants' purchase volume to reach \$6,000 to maintain his District Director level. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

d. Regional Director - A Regional Director purchases at the Basic Discount of 35%. He receives an additional profit of 15% on personal purchases, 15% on directly and indirectly sponsored Consultants' purchases, 10% on directly and indirectly sponsored Senior Consultants' purchases, and 5% on directly and indirectly sponsored District Directors' purchases. If his purchase volume for any month reaches (purchase volume to include purchases volumes of his Senior Consultants, Consultants and directly and indirectly sponsored District Directors) \$12,500, he receives 2% on purchase volume of directly sponsored Regional Directors. A Regional Director receives \$200 additional profit for each month that his purchase volume reaches \$17,500. A Regional Director is to reach \$30,000 from his District Directors' purchase volume, his Senior Consultants' purchase volume and his Consultants' purchase volume in one calendar quarter to maintain his Regional Director level. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

8. Prior to April 1, 1972, the Symbra'ette marketing plan was a distribution network which allowed a potential distributor to enter at any one of three levels, i.e., "Key Distributor", "Senior Key" or "Supervisor", and eventually qualify at a fourth and fifth level, that of District Manager

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and Regional Manager. One entered into the Symbra'ette distribution system by purchasing merchandise from Symbra'ette or its distributors. All distributors, except for the Key Distributors (hereinafter sometimes referred to as Keys), bought directly from Symbra'ette. A distributor's gross profit was the difference between the price or prices he paid for Symbra'ette products and the price at which he sold them, plus additional profits on the purchase volume of those Consultants directly sponsored by the Distributor.

a. Key Distributor - Key Distributors purchased their products for resale at 35% off the retail list price, known by Symbra'ette as the retail purchase volume (or R.P.V.). There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

b. Senior Key - Senior Keys purchased their needs directly from Symbra'ette at 40% off the retail list price for sale to Keys or the general public. There was no predetermined limit to the number of distributors who may be recruited, nor was there a predetermined limit as to the size of any distributor's organization. A Senior Key received a 5% additional profit on purchases made by his directly recruited Key Distributors and a 1% additional profit on purchases made by his directly recruited Senior Keys' groups. A person became a Senior Key either by purchasing an initial inventory of \$1,000 in terms of retail list prices or by starting out as a Key Distributor and, with his personal group, reaching a monthly retail purchase volume of \$1,000. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

c. Supervisor - Supervisors purchased their products for resale at 45% off the retail list price, and purchased from Symbra'ette. A Supervisor's organization or personal group included his directly sponsored Senior Keys' entire groups and his directly sponsored Key Distributors' entire groups.

A distributor who has one directly recruited Senior Key and two directly recruited Key Distributors became a Supervisor either by purchasing an inventory of \$3,000 in terms of retail list prices or, with his personal group, reaching a monthly retail purchase volume of \$3,000. A Supervisor earned

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Stipulation of Facts Dated March 16, 1973

a 50 additional profit on purchases made by his Senior Keys and a 100 additional profit on purchases made by his Key Distributors. He also received a 20 additional profit on purchases made by his directly recruited Supervisor's group. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

d. District Manager - A District Manager purchased products from Symbra'ette at a 50% discount from suggested resale price.

A District Manager's personal group included his directly sponsored Supervisors' entire groups, and his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

A District Manager and his organization initially purchased a dollar volume of \$7,500 inventory for one month and had to maintain a monthly purchase volume of \$3,000 to remain at this level of the program. One could not "begin" as a District Manager, but, rather, had to "work" his way to this position, by recruiting at least 5 people who reached Senior Key or Supervisor positions in his organization.

A District Manager earned a 15% profit on purchases of his Keys, 100 additional profit on purchases of his Senior Keys, 50 additional profit on his Supervisors' purchases, 30 additional profit on the purchases of his directly sponsored District Managers' sales groups, and 10 on the purchases of indirectly sponsored District Managers' personal groups. He also earned a cash car allowance of \$150 on R.P.V. of \$7,500 per month of his personal group. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

e. Regional Manager:

The highest level one could reach with Symbra'ette was that of a Regional Manager. A Regional Manager bought his products at a 55% discount from Symbra'ette.

The personal group of a Regional Manager included his directly sponsored District Managers' entire groups, his directly sponsored Supervisors' entire groups, his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

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Stipulation of Facts Dated March 16, 1973

A District Manager's personal group R.P.V. must have reached \$25,000 in one month in order to entitle that District Manager to ascend to the position of Regional Manager. Thereafter, a monthly minimum R.P.V. of \$12,500 was required to remain at this level of the program.

The Regional Manager earned at 20% profit on purchases of his Keys, a 15% additional profit on his Senior Keys' purchases, a 10% additional profit on his Supervisors' purchases, a 5% additional profit on his directly sponsored District Managers' purchases, 3% on his directly sponsored Regional Managers' personal group purchases. He also earned a \$200 cash car allowance on \$17,500 monthly personal group R.P.V. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

9. There is no contention that any deception, fraud, unethical practice, misrepresentation, or improper conduct is present in the presentation of the products or their prices to consumers.

10. There are competitors of Symbra'ette selling brassieres, girdles, swim-wear, and lingerie under similar marketing and sales programs. As of March 16, 1973, the Federal Trade Commission has instituted no formal proceedings against any of these competitors on the issues raised by the present complaint.

11. Industries, such as the food retail and gasoline industries, have employed games of chance to promote the sale of their products.

12. The Federal Trade Commission has promulgated a Trade Regulation Rule (RX-146) under which food retailers and gasoline retailers may employ games of chance in promoting their products.

13. The consultant agreement (RX-2), which has been used by Symbra'ette since April 1, 1972, states that Symbra'ette has limited its number of active distributors to 1/10th of 1% of the population of each state.

14. Symbra'ette distributors do not pay any release fee or the like.

15. Symbra'ette distributors instruct their directly sponsored distributors in selling and fitting Symbra'ette products, publish newsletters, and hold meetings for sponsored distributors.

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Stipulation of Facts Dated March 16, 1973

THE FOLLOWING IS A LIST OF DOCUMENTS AND OTHER EXHIBITS AS TO WHICH COUNSEL WILL STIPULATE, AND WHAT WILL BE STIPULATED AS TO EACH OF THEM. THE COPIES OF ORIGINAL DOCUMENTS DESCRIBED BELOW AND ATTACHED HERETO MAY BE RECEIVED INTO EVIDENCE IN LIEU OF THE ORIGINALS.

II. EXHIBIT

IDENTIFICATION NO.IDENTIFICATION

CX-1
A to P

A yellow colored booklet entitled
"Your opportunity with "Symbra'ette"

The booklet was published by Ger-Ro-Mar, Inc., and disseminated in interstate commerce to various distributors and prospective distributors of Ger-Ro-Mar, Inc. This booklet was sent to persons who responded to the ad identified as CX-2 (below).

CX-2
A to B

An advertisement identified by
the title "The Era Revolution
Began In 1962...."

This document was published and distributed in interstate commerce by Ger-Ro-Mar for the purpose of advertising Ger-Ro-Mar's products and its marketing plan. Use thereof was discontinued in 1962.

CX-3
A to B

Pamphlet showing various styles of
Symbra'ette lingerie. Use thereof
was discontinued in December 1971.

CX-4

Pamphlet showing Symbra'ette swim
wear and sports wear.

CX-5
A to C

Pamphlet showing representative
Symbra'ette bras and girdles.

CX-6
A to B

Pamphlet entitled "Symbra'ette,
Excitingly Different," showing
and describing features of
Symbra'ette bras and girdles.
Use thereof was discontinued
in 1971.

These exhibits, and/or the products themselves, indicate the product line of Ger-Ro-Mar, Inc.

CX-7
A to D

Symbra'ette Newsletter dated
November 1962.

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
CX-8 A to H	Symbra'ette Newsletter dated March 1970.
CX-9 A to H	Symbra'ette Newsletter dated April - May 1970.
CX-10 A to D	Symbra'ette Newsletter dated June - July 1970.

These newsletters were published by Ger-Ro-Mar, Inc., and were distributed in interstate commerce to Ger-Ro-Mar distributors on all levels throughout the country.

CX-11 A to D	A sample Ger-Ro-Mar distributorship agreement, entitled "Consultant Agreement". Undated. Use thereof discontinued in March 1972.
CX-12	Photocopy of: Katie Sanford distributor agreement dated January 28, 1970.
CX-13	Ann Anderson distributorship agreement dated December 31, 1969.
CX-14	Ruth Mouzon distributorship agreement dated April 10, 1970.
CX-15	Ruth and Fred Mouzon distributorship agreement dated September 1, 1970.
CX-16	Chris Wolfe distributorship agreement dated January 5, 1970.
CX-17	Stella Byers distributorship agreement dated December 31, 1969.
CX-18	Kay Monroe distributorship agreement dated December 31, 1969.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION RESPONDENT
Exhibit No. <u>82</u> (P)	

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
CX-19	Mary Avers distributorship agreement dated April 7, 1970.
CX-20	Rachel Cuoret distributorship agreement dated June 20, 1970.
CX-21	Avis Morgan distributorship agreement dated January 9, 1970.
CX-22	Margaret Weston distributorship agreement dated October 1, 1970.

The copies (CX-12 through CX-22) are exact duplicates of the originals in the possession of Ger-Ro-Mar, Inc., and may serve as being typical and representative of all distributorship agreements entered into between Ger-Ro-Mar, Inc. and its distributors prior to April 1, 1972.

CX-23	Chris Wolfe Regional Manager order form dated October 4, 1970.
CX-24	Chris Wolfe Regional Manager order form dated October 7, 1970.
CX-25	Dorothy Worth's District Manager order form dated October 12, 1970.
CX-26	Alaska Pierce's District Manager order form dated October 1, 1970.
CX-27	Pauline Mitchell's Supervisor order form dated October 1, 1970.
CX-28	Joyce Stone's Supervisor order form dated October 6, 1970.
CX-29	Katie Sanford Regional Manager order form dated March 6, 1971.
CX-30	Alaska Pierce District Manager order form dated March 6, 1971.
CX-31	Lillian Culev District Manager order form dated March 4, 1971.

FEDERAL TRADE COMMISSION	
Docket No. <u>8672</u>	COMMISSION Exhibit No. <u>92</u> RESPONDENT <u>(10)</u>

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
CX-32	Jean Thomas Supervisor Order form dated March 5, 1971.
CX-33	Jean Thomas Supervisor Order form dated March 5, 1971. (swimwear.)
CX-34	Judith Marsh Senior Key order form dated March 2, 1971.
CX-35	Ann Anderson Regional Manager order form dated February 1, 1971.
CX-36	Fred & Ruth Mouzon District Manager order form dated March 8, 1971.
CX-37	Mickey Davis District Manager order form dated March 6, 1971.
CX-38	Essie Loftin Supervisor order form dated March 6, 1971, #4.
CX-39	Essie Loftin Supervisor order form dated March 6, 1971, #3.
CX-40	J. S. Hart Senior Key order form dated March 6, 1971, #4.
CX-41	J. S. Hart Senior Key order form dated March 5, 1971, #3.
CX-42	Mary Ayers District Manager order form dated March 5, 1971, #3.
CX-43	Mary Ayers District Manager order form dated March 5, 1971, #5.
CX-44	Ida Langston Supervisor order form of March 6, 1971, #1.
CX-45	Evelyn Graus Senior Key order form dated March 6, 1971.

FEDERAL TRADE COMMISSION	
Docket No. <u>88-21</u>	COMMISSION RESPONDENT
Exhibit No. <u>92</u>	(11)

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

CX-46

Shelba Morrison Senior Key order
form dated March 4, 1971.

The copies are exact duplicates of the originals of these documents which are in possession of Ger-Ro-Mar, Inc. These may serve as being typical and representative of all such order form-invoices used in the course and conduct of Ger-Ro-Mar's business prior to April 1, 1972.

CX-47

Ruth Mouzon Purchase Volume Discount
record dated January 1971.

CX-48

Alaska Pierce Purchase Volume
Discount record dated January 1971.

CX-49

Essie Loftin Purchase Volume
Discount record dated August 1970.

CX-50

Essie Loftin Purchase Volume
Discount record dated September
1970.

CX-51

Jean Thomas Purchase Volume Discount
record dated January 1971.

CX-52

Mildred Dist Purchase Volume
Discount record dated January 1971.

CX-53

Pauline Mitchell Purchase Volume
Discount record dated January 1971.

CX-54

Mastels Purchase Volume Discount
record undated.

CX-55

Stella Byers Monthly Purchase
Volume record dated January 1971.

CX-56

Lil Blamnan Monthly Purchase
Volume record undated.

CX-57

Eva Bowman Monthly Purchase Volume
record undated.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION RESPONDENT
Exhibit No. <u>92</u> <u>(12)</u>	

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
CX-58	Illa Blandy Monthly Purchase Volume record undated.
CX-59	Joy Adkins Monthly Purchase Volume record undated.
CX-60	Elaine Majolo Monthly Purchase Volume record undated.
CX-61	Mary Ann Monlor Monthly Purchase Volume record undated.
CX-62	Lillian V. Mitchell Monthly Purchase Volume record dated January 1971.
CX-63	Carolyn Brown Monthly Purchase Volume record undated.
CX-64	Geri Myers Monthly Purchase Volume record dated January 1971.
CX-65	Wanda Marsh Monthly Purchase Volume record dated January 1971.
CX-66	Ross Efferd Monthly Purchase Volume record dated January 1971.
CX-67	Vengie Ellsworth Monthly Purchase Volume record dated January 1971.
CX-68	Dorothy Elliott Monthly Purchase Volume record dated January 1971.
CX-69	Betty Faulkner Monthly Purchase Volume record dated January 1971.
CX-70	Thomas Fahey Monthly Purchase Volume record dated January 1971.
CX-71	Katie Sanford Purchase Volume discount record dated January, 1971.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION Exhibit No. <u>92</u> <u>(13)</u>

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

CX-72

Ann Anderson Purchase Volume
Discount record dated January, 1971.

CX-73

Mrs. James Baker Monthly Purchase
Volume record dated January 1, 1971.

These exhibits are the exact duplicates of the originals currently in possession of Ger-Ro-Mar, Inc., and may serve as being typical and representative of all other similar documents currently in the possession of Ger-Ro-Mar, Inc. that were used prior to April, 1972.

CX-74

A to 235

A booklet entitled "Symbra'ette
Sales Manual".

The booklet is authentic, was and is published by Ger-Ro-Mar, Inc., and is distributed to each Ger-Ro-Mar distributor. It is to this document that the terms "Sales Manual" and "Rules and Regulations" contained in the "consultant agreements" refer. Use thereof was discontinued in March, 1972.

CX-75

A to 216

A Flip Chart entitled "Your
Opportunity with Symbra'ette".

This Flip-chart was and is published by Ger-Ro-Mar, Inc., is distributed in interstate commerce to Ger-Ro-Mar distributors and is, and has been, shown to prospective distributors located in states other than California, the state of origination. Use thereof was discontinued in March, 1972.

The above described documents are business records of respondents kept in the regular course of its business.

III. The documents listed below are genuine and authentic documents, or are true and correct copies of the originals of documents which are genuine and authentic.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION RESPONDENT Exhibit No. <u>22</u> (14)

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

RX-1	Symbra'ette Sales Manual as of April 1, 1972, including Summary of Sales Program as the last page thereof.
RX-2	Symbra'ette Consultant Agreement as of April 1, 1972.
RX-3	Symbra'ette Sample Kit Order Form as of April 1, 1972.
RX-4	Symbra'ette Wholesale Order Form as of April 1, 1972 (Swimwear).
RX-5	Symbra'ette Wholesale Order Form as of April 1, 1972 (Brassieres).
RX-6	Random list to show initial order from distributors.
RX-7	Store advertisement of Symbra'ette brassieres.
RX-8	Flyer by a Regional Manager.
RX-9	Symbra'ette News, July, 1971.
RX-10	Symbra'ette News, May, 1972.
RX-11	Symbra'ette News, June, 1972.
RX-12	Symbra'ette News, May 1971.
RX-13	Order from Paulette's
RX-14	Memorandum showing active Distributors as of December 4, 1967.
RX-15	Memorandum showing active Distributors as of December 19, 1967.
RX-16	Memorandum showing active Distributors as of January 22, 1968.

FEDERAL TRADE COMMISSION	
Docket No. 8872	COMMISSION RESPONDENT
Exhibit No. 42	(15)

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

RX-17	Memorandum showing active Distributors as of February 6, 1968.
RX-18	Memorandum showing active Distributors as of April 5, 1968.
RX-19	Memorandum showing active Distributors as of June 13, 1968.
RX-20	Memorandum showing active Distributors as of July 19, 1968.
RX-21	Memorandum showing active Distributors as of July 31, 1968.
RX-22	Memorandum showing active Distributors as of August 22, 1968.
RX-23	Memorandum showing active Distributors as of September 11, 1968.
RX-24	Memorandum showing active Distributors as of October 3, 1968.
RX-25	Memorandum showing active Distributors as of October 31, 1968.
RX-26	Memorandum showing active Distributors as of December 17, 1968.
RX-27	Memorandum showing active Distributors as of January 17, 1969.
RX-28	Memorandum showing active Distributors as of January 29, 1968.
RX-29	Memorandum showing active Distributors as of March 19, 1969.
RX-30	Memorandum showing active Distributors as of April 24, 1969.

FEDERAL TRADE COMMISSION

Docket No. 8871 - COMMISSION Exhibit No. 92
 - RESPONDENT (16)

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
RX-31	Memorandum showing active Distributors as of May 22, 1969.
RX-32	Memorandum showing active Distributors as of May 29, 1969.
RX-33	Memorandum showing active Distributors as of June 3, 1969.
RX-34	Memorandum showing active Distributors as of June 12, 1969.
RX-35	Memorandum showing active Distributors as of June 26, 1969.
RX-36	Memorandum showing active Distributors as of July 15, 1969.
RX-37	Memorandum showing active Distributors as of September 4, 1969.
RX-38	Memorandum showing active Distributors as of October 14, 1969.
RX-39	Memorandum showing active Distributors as of October 21, 1969.
RX-40	Memorandum showing active Distributors as of November 10, 1969.
RX-41	Memorandum showing active Distributors as of November 21, 1969.
RX-42	Memorandum showing active Distributors as of December 16, 1969.
RX-43	Memorandum showing active Distributors as of January 6, 1970.
RX-44	Memorandum showing active Distributors as of January 21, 1970.
RX-45	Memorandum showing active Distributors as of February 24, 1970.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION RESPONSE Exhibit No. <u>92</u> <u>(17)</u>

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
RX-46	Memorandum showing active Distributors as of February 24, 1970.
RX-47	Memorandum showing active Distributors as of March 31, 1970.
RX-47	Memorandum showing active Distributors as of April 15, 1970.
RX-48	Memorandum showing active Distributors as of May 15, 1970.
RX-49	Memorandum showing active Distributors as of July 24, 1970.
RX-50	Memorandum showing active Distributors as of August 22, 1970.
RX-51	Memorandum showing active Distributors as of September 17, 1970.
RX-52	Memorandum showing active Distributors as of September 22, 1970.
RX-53	Memorandum showing active Distributors as of October 22, 1970.
RX-54	Memorandum showing active Distributors as of November 17, 1970.
RX-55	Memorandum showing active Distributors as of December 18, 1970.
RX-56	Memorandum showing active Distributors as of December 29, 1970.
RX-57	Memorandum showing active Distributors as of February 2, 1971.
RX-58	Memorandum showing active Distributors as of March 12, 1971.
RX-59	Memorandum showing active Distributors as of May 5, 1971.
RX-60	Memorandum showing active Distributors as of July 21, 1971.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION Exhibit No. <u>12</u> (18)

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

RX-61	Memorandum showing active Distributors as of August 5, 1971.
RX-62	Memorandum showing active Distributors as of August 30, 1971.
RX-63	Memorandum showing active Distributors as of September 16, 1971.
RX-64	Memorandum showing active Distributors as of September 20, 1971.
RX-65	Memorandum showing active Distributors as of October 15, 1971.
RX-66	Memorandum showing active Distributors as of October 29, 1971.
RX-67	Memorandum showing active Distributors as of November 12, 1971.
RX-68	Memorandum showing active Distributors as of November 17, 1971.
RX-69	Memorandum showing active Distributors as of December 20, 1971.
RX-70	Memorandum showing active Distributors as of January 12, 1972.
RX-71	Memorandum showing active Distributors as of February 29, 1972.
RX-72	Order form of Janelle's Curves and Curls, retail store buying merchandise from Symbra'ette.
RX-73	Order form of Milliken Career Apparel, retail store buying merchandise from Symbra'ette.
RX-74	Order form of Jane & Jean's Bra Shoppe, retail store buying merchandise from Symbra'ette.

FEDERAL TRADE COMMISSION

Docket No. 8872 COMMISSION Exhibit No. 92~~RESPONDENT~~

(142)

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

RX-75	Order form of Bra and Top Shop, retail store buying merchandise from Symbra'ette.
RX-76	Order form of Sara & Ann's Undercover World, retail store buying merchandise from Symbra'ette
RX-77	Order form of Smart Shop, retail store buying merchandise from Symbra'ette.
RX-78	Order form of Mary Kate Boutique, retail store buying merchandise from Symbra'ette.
RX-79	Order form of Moreda Clayton - Merle Norman Studio, retail store buying merchandise from Symbra'ette
RX-80	Order form of Vivian Brownlee's Odds & ends Boutique, retail store buying merchandise from Symbra'ette.
RX-81	Order form of Cynthia's Boutique, retail store buying merchandise from Symbra'ette.
RX-82	Order form of (Norma Lee Cox) Bridal Shop, retail store buying merchandise from Symbra'ette.
RX-83	Order form of H.E. Cotner - Boutique of Beauty, retail store buying merchandise from Symbra'ette.
RX-84	Symbra'ette News, March, 1970.
RX-85	Newsletter of Chris Wolfe (Symbra'ette Regional Director)
RX-86	Announcement by Regional Manager

FEDERAL TRADE COMMISSION

Docket No. 8872 COMMISSION Exhibit No. 92
 -RESPONDENT- (20)

Stipulation of Facts Dated March 16, 1973

<u>EXHIBIT IDENTIFICATION NO.</u>	<u>IDENTIFICATION</u>
RX-87	Newsletter of Edith Gustin dated November 1972 (Symbra'ette Regional Director).
RX-88	Newsletter of Carolyn Wiens dated August 1971 (TLC Regional Director).
RX-89	Newsletter of Carolyn Wiens dated February 1971 (Symbra'ette Regional Director).
RX-90	Newsletter of Carolyn Wiens dated December 1970 (Symbra'ette Regional Director).
RX-91	Newsletter of Edith Gustin dated March 23, 1972 (Symbra'ette Regional Director).
RX-92	Newsletter of Edith Gustin dated March 23, 1972 (Symbra'ette Regional Director).
RX-93	Newsletter of Edith Gustin dated March 10, 1972 (Symbra'ette Regional Director).
RX-94	Typical Commission Statement of Symbra'ette consultant - Barbara Chung
RX-95	Typical Commission Statement of Symbra'ette District Director - Geney & Joe Nelson.
RX-96	Typical Commission Statement of Symbra'ette Regional Director - Edith Gustin.
RX-97	Typical Commission Statement of Symbra'ette District Director - Judy McCaskill.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION RESPONDENT
Exhibit No. <u>92</u>	<u>(21)</u>

Stipulation of Facts Dated March 16, 1973

RX-98	Typical Commission Statement of Symbra'ette Senior Consultant - Virginia Penner.
RX-99	Typical Commission Statement of Symbra'ette Senior Consultant - Irmgard Schwerdle.
RX-100	Typical Commission Statement of Symbra'ette Senior Consultant - June Hall
RX-101	Typical Commission Statement of Symbra'ette Senior Consultant - Cherie Kidd.
RX-102	Typical Commission Statement of Symbra'ette Senior Consultant - Marv Koop.
RX-103	Typical Commission Statement of Symbra'ette Senior Consultant - Terri Mendoza.
RX-104	Typical Commission Statement of Symbra'ette Senior Consultant - Shirley Defendorf.
RX-105	Typical Commission Statement of Symbra'ette Consultant - Cynthia Harell.
RX-106	Typical Commission Statement of Symbra'ette Consultant - Betty Spires.
RX-107	Typical Commission Statement of Symbra'ette District Director - Peggy Yount.
RX-108	Typical Commission Statement of Symbra'ette District Director - Yvonne Ferguson.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION Exhibit No. <u>92</u> Response (22)

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Stipulation of Facts Dated March 16, 1973

RX-109 Typical Commission Statement of Symbra'ette District Director - Ina McGhee.

RX-110 Typical Commission Statement of Symbra'ette District Director - Marrian Poisson.

RX-111 Typical Commission Statement of Symbra'ette District Director - Lois Kensey.

RX-112 Typical Commission Statement of Symbra'ette District Director - Essie Lee Loftin.

RX-113 Graph showing R.P.V. through 1970 to 1972 and Consultant's permanent current record for Ruth Mouzon.

RX-114 Graph showing R.P.V. through 1968 to 1972 and Consultant's permanent current record for Jane Morris.

RX-115 Graph showing R.P.V. through 1968 to 1972 and Consultant's permanent current record for Carolyn Wiens.

RX-116 Advertisement from Yellow Pages of Orange County telephone book showing Symbra'ette and TLC Bra advertisement - Geri Myers.

RX-117 TLC publication dated January 1972, "1 + 2 = Two".

RX-118 TLC publication "The Latest Coverage" dated August 1972.

RX-119 TLC publication "Progress-O-Gram" dated February 23, 1972.

RX-120 Newsletter of Carolyn Wiens dated August 1971 (TLC Regional Director).

RX-121 Newsletter of Carolyn Wiens dated July 1972 (TLC Regional Director).

FEDERAL TRADE COMMISSION	
Docket No. <u>6872</u>	COMMISSION Exhibit No. <u>92</u>
RESPONDENT <u>(23)</u>	

*Stipulation of Facts Dated March 16, 1973*EXHIBIT
IDENTIFICATION NO.IDENTIFICATION

RX-122	Symbra'ette Consultant Permanent Record and Monthly R.P.V. Record for Aranda Smith.
RX-123	Symbra'ette Monthly R.P.V. Record for Geri Myers.
RX-124	Symbra'ette Monthly R.P.V. Record for Laquieta Baker.
RX-125	Symbra'ette Monthly R.P.V. Record for Dot Byrd.
RX-126	Symbra'ette Monthly R.P.V. Record for Stella Byers.
RX-127	Symbra'ette Monthly R.P.V. Record for Louise Halev
RX-128	Symbra'ette Monthly R.P.V. Record and Consultant Permanent Record for Isabella Aren.
RX-129	Symbra'ette Monthly R.P.V. Record for Beth Vinett.
RX-130	Symbra'ette Consultant Permanent Record and Monthly R.P.V. Record for Illa Brawdy.
RX-131	Symbra'ette Consultant Permanent Record and Monthly R.P.V. Record for Marge Miller.
RX-132	Symbra'ette Consultant Permanent Record and Monthly R.P.V. Record for Rachel Cypret.
RX-133	Symbra'ette Monthly R.P.V. Record for Ruth R. Stafford
RX-134	Symbra'ette Consultant Permanent Record and Monthly R.P.V. Record for Aleta B. Williams.

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION Exhibit No. <u>92</u>
	RESPONDENT <u>(24)</u>

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Stipulation of Facts Dated March 16, 1973

EXHIBIT
IDENTIFICATION NO.

IDENTIFICATION

RX-135	Symbra-ette Monthly R.P.V. Record for Jo Anne Krause.
RX-136	TLC Newsletter from Carolyn Wiens dated August 4, 1971.
RX-137	TLC Announcement from Carolyn Wiens.
RX-138	Marketing plan for Mibra (a division of Arengue Enterprises, Inc.)
RX-139	Marketing plan for Shaklee, Co.
RX-140	Marketing plan for Kardee (Runnels Co. Inc.)
RX-141	Marketing plan of Con-Stan Industries, Inc.
RX-142	Marketing plan of T.L.C., Inc.
RX-143	Marketing plan of Nutrilite
RX-144	Marketing plan of Command Performance, Inc.
RX-145	Marketing plan of Figurette.
RX-146	Federal Trade Commission - "Trade Regulation Rule For Games Of Chance In the Food Retailing And Gasoline Industries And Accompanying Statement Of Basis And Purpose Of Rule"
RX-147	Staff Report To The Federal Trade Commission - "Economic Report ON Use of Games of Chance In Food And Gasoline Retailing".
RX-148	'San Jose News', December 20, 1972, article entitled "U.N. Eyes Lottery".
RX-149	'San Jose News', August 12, 1971, article entitled "For Financial Relief More States Plan Lotteries"

FEDERAL TRADE COMMISSION

Docket No. 88-22 COMMISSION Exhibit No. 92
RESPONDENT (35)

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Stipulation of Facts Dated March 16, 1973

EXHIBIT
IDENTIFICATION NO.

RX-150

RX-151

IDENTIFICATION

Newspaper clipping on California Lottery Plan, "San Francisco Chronicle", March 5, 1973.

Telephone Listings (Yellow Pages) Pacific Telephone Director November, 1972 on Page 419, shows distributors handling competing lines.

Respectfully submitted,

Jerome H. Steiner, Jr.
Jerome H. Steiner, Jr.

Ralph E. Stone
Ralph E. Stone
Counsel Supporting Complaint

Jack M. Wiseman
Jack M. Wiseman
Respondents' Counsel

DATED: 3/16/73

FEDERAL TRADE COMMISSION	
Docket No. <u>8872</u>	COMMISSION Exhibit No. <u>82</u> <u>(26)</u>

**Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen**

ROSENBERG AND WISEMAN

JACK M. WISEMAN

2084 Alameda Way

San Jose, California 95126

Telephone: (408) 248-0893

Attorneys for Ger-Ro-Mar, Inc.
and Carl G. Simonsen

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8872

Examiner: William K. Jackson

[SAME TITLE]

Now comes the respondents, Ger-Ro-Mar, Inc. and Carl G. Simonsen, and answering the Complaint on file herein admit, deny and allege as follows:

1. In answer to the allegations of Paragraph Two of the Complaint, respondents deny that it is inducing or has induced persons to invest substantial sums of money in its multilevel marketing program or any marketing program, and is without information and belief as to what constitutes a "multilevel" marketing program and on that ground denies each and every allegation thereof.

*Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen*

2. In further answer to the allegations of Paragraph Two of the Complaint, respondents affirm that goods are sold under the mark "Symbra'Ette," but lack information and belief as to what constitutes the "Symbra'Ette" marketing plan and on that ground denies each and every allegation thereof.

3. In answer to the allegations of Paragraph Three, respondents lack information and belief as to what constitutes its "multilevel" marketing program and on that ground denies each and every allegation thereof.

4. In answer to the allegations of Paragraph Four, respondents deny that actual and potential competition has been lessened, hampered, restricted or restrained by reason of practices alleged in the Complaint.

5. In answer to the allegations of Paragraph Five, respondents admit that Ger-Ro-Mar has formulated a distribution system and has published its marketing plan or distribution policies, but denies each and every other allegation there contained.

6. In answer to the allegations of Paragraph Six, respondents deny a key must purchase his goods from his sponsor and further deny a key must purchase monthly \$100 of merchandise or must purchase initially \$300 worth of merchandise and further deny that Senior keys must maintain a monthly purchase volume of \$500, and further denies that Supervisors must maintain a monthly inventory pur-

*Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen*

chase volume of \$1,500, and further denies that a District Manager must maintain a monthly purchase volume of \$3,000, and further denies that a Regional Manager is required to order a monthly minimum of \$12,500.

7. In answer to the allegations of Paragraph Seven, respondents deny each and every allegation thereof and specifically deny that Ger-Ro-Mar entered into contracts, agreements, combinations or understandings with each of its distributors whereby said distributors agree to maintain the resale prices established and set forth by the company and further specifically deny that Ger-Ro-Mar entered into contracts, agreements, combinations or understandings with each of its distributors whereby said distributors are restricted as to their suppliers and customers.

COUNT I

As to Count I, respondents admit, deny and allege as follows:

1. In answer to the allegations of Paragraph Eight in which is incorporated therein Paragraphs One Through Seven of the Complaint, respondents incorporate herein by reference each and every admission, denial and allegation of Paragraphs One Through Seven, inclusive, of respondents' answer to Paragraphs One Through Seven of the Complaint.

2. In answer to the allegations of Paragraph Nine, respondents deny that Ger-Ro-Mar's merchandising program is in the nature of a lottery and specifically deny that

*Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen*

profits earned by distributors constitute a prize and further specifically deny that there is any chance aspect in the manner alleged in said Paragraph Nine, and further specifically deny that any saturation must ultimately occur. On the contrary, respondents allege that Ger-Ro-Mar has a turn over of its distributors and dealers in the manner other sales organizations have turn overs in their distributors and dealers.

3. In further answer to the allegations of Paragraph Nine, respondents deny that Ger-Ro-Mar's sales methods involve the use of lottery devices to the public or contravene established public policy of the United States, or are prejudicial to the public, or constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

COUNT II

As to Count II, respondents admit, deny and allege as follows:

1. In answer to the allegations of Paragraph Ten in which is incorporated therein Paragraphs One Through Seven of the Complaint, respondents incorporate herein by reference each and every admission, denial and allegation of Paragraphs One Through Seven, inclusive, of respondents' answer to Paragraphs One Through Seven of the Complaint.

2. In answer to the allegations of Paragraph Eleven, respondents deny each and every allegation there contained

*Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen*

excepting that respondents admit Ger-Ro-Mar represents in its promotional material that each distributor can recruit five dealers per month.

COUNT III

As to Count III, respondents admit, deny and allege as follows:

1. In answer to the allegations of Paragraph Twelve in which is incorporated therein Paragraphs One Through Seven of the Complaint, respondents incorporate herein by reference each and every admission, denial and allegation of Paragraphs One Through Seven, inclusive, or respondents' answer to Paragraphs One Through Seven of the Complaint.

2. In answer to the allegations of Paragraph Fourteen, respondents deny each and every allegation there contained, and specifically deny that statements and representations made by respondents have been or are false, misleading and deceptive, and constitute unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT IV

As to Count IV, respondents admit, deny and allege as follows:

1. In answer to the allegations of Paragraph Fifteen in which is incorporated therein Paragraphs One Through

*Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen*

Seven of the Complaint, respondents incorporate herein by reference each and every admission, denial and allegation of Paragraph One Through Seven, inclusive, of respondents' answer to Paragraphs One Through Seven of the Complaint.

2. In answer to the allegations of Paragraph Sixteen, respondents deny each and every allegation there contained and specifically deny that acts, practices and methods of competition of respondents constitute an unreasonable restraint of trade and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT V

As to Count V, respondents admit, deny and allege as follows:

1. In answer to the allegations of Paragraph Seventeen in which is incorporated therein Paragraph One Through Seven of the Complaint, respondents incorporate herein by reference each and every admission, denial and allegation of Paragraphs One Through Seven, inclusive, of respondents' answer to Paragraphs One Through Seven of the Complaint.

2. In answer to the allegations of Paragraph Eighteen, respondents deny each and every allegation there contained and specifically deny that the acts, practices and methods of competition of the respondents constitute an unreason-

*Answer of Respondents Ger-Ro-Mar, Inc.
and Carl G. Simonsen*

able restraint of trade and unfair method of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

WHEREFORE, respondents pray judgment that:

1. This complaint be dismissed;
2. A decision be entered in favor of the respondents;
3. Other relief be granted that is deemed proper.

Date: FEB 3 1972

ROSENBERG AND WISEMAN

By JACK M. WISEMAN

Jack M. Wiseman

Attorneys for Respondents

Initial Decision

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8872

[SAME TITLE]

DANIEL H. HANSCOM, *Administrative Law Judge.*

JEROME M. STEINER, JR., and
RALPH E. STONE,
Counsel Supporting the Complaint.

JACK M. WISEMAN,
ROSENBERG and WISEMAN,
2084 Alameda Way,
San Jose, California,
Counsel for Respondent.

PRELIMINARY STATEMENT

The complaint in this matter charged respondents with unfair and deceptive acts and practices, and unfair methods of competition, in the promotion of their Symbra'ette marketing program. In essence, the complaint alleged that the Symbra'ette marketing program constituted an open-ended, multi-level (pyramidal) scheme which unfairly and deceptively induced members of the public to invest substantial amounts of money for distributorships. According to the complaint, the Symbra'ette marketing program consisted of a distribution network allowing a prospect

Initial Decision

to enter at any one of three levels, Key Distributor, Senior Key, or Supervisor, and eventually, as represented by respondents, to qualify at a fourth and fifth level, District Manager and Regional Manager. A prospective distributor entered the Symbra'ette system by purchasing an inventory of Symbra'ette products consisting of bras, girdles, lingerie, swimwear or wigs. The level at which a prospect entered was determined by the size of the initial inventory purchased. Upon entrance into the program, according to the complaint, a distributor could recruit any number of additional distributors, and the large earnings in the form of commissions, overrides, and other compensation, held out by respondents as available to each participant, depended on recruiting by such additional distributors, and by their recruits *ad infinitum*. It was alleged that the size of the commissions, overrides, and other compensation, represented as flowing to a Symbra'ette distributor as a result of sales to and by such distributor's recruits, his recruits' recruits, and so on, was based on the level at which he entered the Symbra'ette distributional system, or had reached once enrolled.

Respondents' Symbra'ette marketing program was challenged in several Counts. Count I of the complaint charged that the program involved the elements of prize, consideration and chance, and that it was in the nature of a lottery and was unfair within the intent and meaning of the Federal Trade Commission Act. Count II alleged that the Symbra'ette program held out to members of the public the lure of making large sums of money through commissions, overrides, and other compensation, based on endless recruitment of additional participants which was essen-

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tially impossible, and that the program was therefore unfair and deceptive. Count III alleged that respondents in promoting the Symbra'ette program utilized false, misleading and deceptive representations that it was not difficult for participants to ascend to higher levels of distribution within the system, that all participants had the reasonable expectancy of receiving large profits and earnings, and that the program was commercially feasible for all entrants because the supply of available prospects and investors was relatively inexhaustible.

Count IV and Count V related to different aspects of the program. Count IV charged that respondents unlawfully combined, conspired, and agreed with their distributors to fix, maintain and control the prices at which Symbra'ette products were resold, and to fix, maintain and control the various fees, bonuses, rebates and overrides required to be paid by one distributor to another distributor or class of distributors. Count V alleged that respondents unlawfully combined, conspired, and agreed with their distributors to restrict the customers to whom Symbra'ette distributors could resell their products, and the sources of supply from which distributors could purchase Symbra'ette products.

Respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen filed an answer on February 16, 1972, denying the foregoing allegations and asking that the complaint be dismissed. Both sides conducted discovery, and ultimately stipulated most of the facts. On February 1, 1973, the case was reassigned to the undersigned due to the illness of the original Administrative Law Judge. An Order To Report Progress was issued to both sides on February 2, 1973, and a pretrial

Initial Decision

conference was convened on March 1, 1973. Hearings on the merits were completed on June 19, 1973. The record was closed for the reception of evidence on June 27, 1973, and briefing was concluded on August 20, 1973.

This matter is now before the undersigned for final consideration of the complaint, answer, evidence, and the proposed findings of fact, conclusions, and memoranda filed by counsel for the respondents and complaint counsel. Consideration has been given to all the foregoing material filed by both sides. All proposed findings of fact and conclusions not specifically found or concluded are rejected, and the undersigned, having considered the entire record herein, makes the following findings of fact and conclusions, and issues the following order:

FINDINGS OF FACT*Respondents*

1. Respondent Ger-Ro-Mar, Inc., organized in 1963, is a California corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc. Respondent Ger-Ro-Mar, Inc., formerly maintained its home office and principal place of business at 460 Meridian Avenue, San Jose, California, and presently maintains its home office and principal place of business at 23 Janis Way, Scotts Valley, California.

2. Respondent Carl G. Simonsen, an individual, is President and a director of Symbra'ette, Inc. Respondent Simonsen founded Symbra'ette, instituted the Symbra'ette marketing program and distribution policies, and has been

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and is responsible for establishing, supervising, directing and controlling the business activities and practices of Symbra'ette. His business address is the same as that of Symbra'ette.

3. Symbra'ette is a name registered to Symbra'ette, Inc., under which the activities of respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen are conducted. (Hereinafter, unless otherwise indicated, the activities, acts, and practices of respondents Ger-Ro-Mar, Inc., Carl G. Simonsen and Symbra'ette, Inc., will be referred to collectively as "Symbra'ette").

4. Symbra'ette is now, and for some time has been, engaged in the advertising, offering for sale, sale, and distribution of brassieres, girdles, lingerie, swimwear and wigs to the public, through the Symbra'ette marketing program. Symbra'ette sales to distributors grew rapidly from \$36,832 in 1965 to \$2,054,250 in 1969, but in 1972 fell to \$1,195,465.

5. In the course and conduct of its business, Symbra'ette now causes, and for some time has caused, its products, when sold, to be shipped from its principal place of business in California to purchasers thereof located in various states of the United States and, in the course of establishing and maintaining its marketing program, has transmitted and caused to be transmitted, contracts, promotional material, and business papers to persons located in various states of the United States, and maintains, and at all times mentioned herein has maintained, a substantial

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course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. Symbra'ette and its distributors are in substantial competition in commerce with other firms and persons engaged in the manufacture or distribution of similar products.

(For all of the foregoing see Stipulation, CX 92).

The Symbra'ette Marketing Program

7. The Symbra'ette marketing program utilized five distributional levels, Key Distributors, Senior Keys, Supervisors, District Managers and Regional Managers. These distributors were sometimes referred to collectively in the Symbra'ette program as "Consultants." A prospect was allowed to "buy-in" at any one of three levels, Key Distributor, Senior Key, or Supervisor.

The program represented that District Manager and Regional Manager could be reached by promotion from within if sufficient success were achieved by the entrant in building his "organization" or "personal group" of distributors, and in reaching and maintaining the required retail purchase volume levels (R.P.V.).

One entered the Symbra'ette system by purchasing merchandise from Symbra'ette or one of its distributors. All distributors except Key Distributors bought directly from Symbra'ette.

A Key Distributor's profit was the difference between the prices he paid his sponsor for Symbra'ette products and the prices at which he sold them. The profit of a dis-

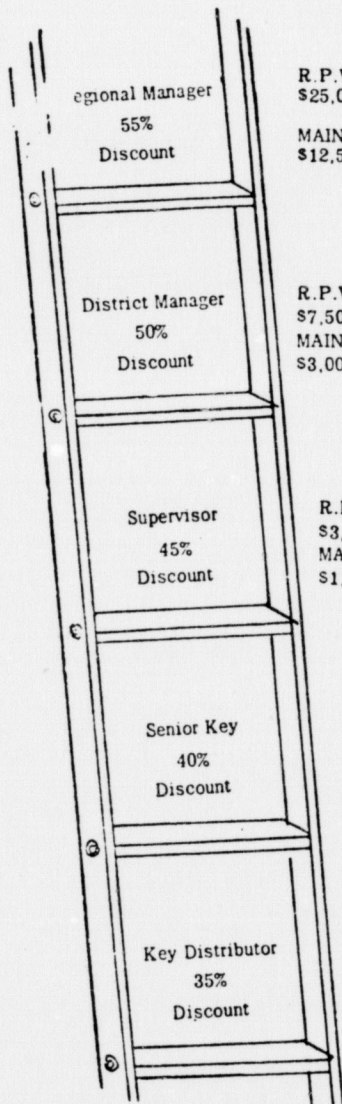
Initial Decision

tributor above the Key Distributor level was the difference between the prices he paid for Symbra'ette products and the prices at which he sold them to Key Distributors he recruited or to the public, and commissions, overrides, and other compensation on the purchase volume of those Consultants directly sponsored by the distributor (CX 1, 74-75, and 92).

The Symbra'ette marketing program is illustrated by the attached reproduced page from the Symbra'ette "Sales Manual" which was distributed and utilized in promoting the program by respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen (CX 74).

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THE SYMBRA'ETTE MARKETING PROGRAM



R.P.V.
\$25,000
MAINTAIN
\$12,500 per month

Qualified Regional Managers earn 5% on District Managers; 10% on Supervisors; 15% on Senior Keys; 20% on Key Distributors; 3% on directly sponsored Regional Managers; 1% on indirectly sponsored Regional Managers; 1% on indirectly sponsored District Managers; \$200 cash car allowance.

R.P.V.
\$7,500
MAINTAIN
\$3,000 per month

Qualified District Managers earn 5% on Supervisors; 10% on Senior Keys; 15% on Key Distributors; 3% on directly sponsored District Managers; 1% on indirectly sponsored District Managers; \$150 cash car allowance.

R.P.V.
\$3,000
MAINTAIN
\$1,500 per month.

Qualified Supervisors earn 5% on Senior Keys; 10% on Key Distributors; 2% on directly sponsored Supervisors; \$100 cash car allowance.

R.P.V.
\$1000
MAINTAIN
\$500 per month

Qualified Senior Keys earn 5% on Key Distributors.

R.P.V.
\$300
MAINTAIN
\$100 per month.

Key Distributors purchase from their sponsor.

YOUR LADDER TO SUCCESS

The Symbra'ette Marketing Program is designed so that the ambitious person can start small or as large as he desires. Consultants can rapidly work into higher income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor.

FEDERAL TRADE COMMISSION	
Docket No. <u>72</u>	COMMISSION EXHIBIT No. <u>740</u>

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8. *Key Distributor*—A prospect could start association with Symbra'ette at this level by purchasing an inventory of \$300 at list price from a sponsor. This required an investment after discount of about \$215 (CX 75Z13). Key Distributors were not permitted to purchase directly from Symbra'ette but, as stated, were required to buy from their sponsors. A Key Distributor bought from his sponsor at 35 percent discount from the Symbra'ette retail list price, and resold at the Symbra'ette established list price. Maintenance of a monthly purchase volume of \$100 in terms of Symbra'ette retail list prices was required.

Purchases of all Symbra'ette distributors were accumulated on a monthly basis and were referred to in the Symbra'ette program as "Retail Purchase Volume" (R.P.V.) (CX 74F, 75S). The basic discount accorded to each classification of distributor was computed from the "Retail Purchase Volume."

A Key Distributor could engage in unlimited recruiting and could advance to the level of Senior Key if his retail purchase volume and that of his recruits amounted to \$1,000 in one calendar month (CX 1, 74G).

9. *Senior Key*—A person could start as a Senior Key by purchasing an inventory of \$1,000 of Symbra'ette products from a sponsor at a 40 percent discount from the Symbra'ette list price (CX 1, 74-75). With literature and sales aids an investment of about \$700 was required (CX 75Z13). A person could also become a Senior Key by advancing to that level from Key Distributor by sponsoring other Key Distributors and with such a "personal group" reaching a monthly retail purchase volume of \$1,000. Sub-

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sequent maintenance of a monthly purchase volume of \$500 in terms of Symbra'ette retail list prices was required of a Senior Key and his organization. Senior Keys could recruit additional distributors on an unlimited basis, and a Senior Key's "organization" or "personal group" included all persons whom he supplied with products. A Senior Key received a 40 percent profit on personal sales, a five percent profit on purchases made by directly recruited Key Distributors, and one percent profit on purchases made by directly recruited Senior Keys and their organizations (CX 92(5)).

10. *Supervisor*—A prospect desiring to start in the Symbra'ette system as a Supervisor was required to purchase an initial inventory of \$3,000 in terms of Symbra'ette retail list prices. Such inventory was purchased at 45 percent off the retail list price, and with literature, sales aids and supplies required an investment of about \$1,950 (CX 75Z12). Thereafter, Supervisors had to maintain a monthly retail purchase volume of \$1,500. Within the Symbra'ette organization a distributor who had at least one (1) directly recruited Senior Key, and two (2) directly recruited Key Distributors could become a Supervisor if such distributors and their recruits as a group attained a monthly retail purchase volume of \$3,000. A Supervisor could recruit an unlimited number of distributors. A Supervisor's "organization" or "personal group" consisted of his directly sponsored Senior Keys and their entire groups, and his directly sponsored Key Distributors and their entire groups. A Supervisor earned 45 percent profit on personal sales, a five percent override on purchases made

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by his Senior Keys, and a 10 percent profit on purchases made by his Key Distributors. He also received a two percent override on purchases made by his directly recruited Supervisors and their personal groups, and was eligible to qualify for a car allowance if his organization's retail purchase volume was large enough (CX 1, 74-75, 92).

11. *District Manager*—A District Manager purchased products from Symbra'ette at a 50 percent discount from list price. A District Manager could recruit an unlimited number of distributors. A District Manager's "personal group" included his directly sponsored Supervisor's entire groups, his directly sponsored Senior Keys' entire groups, and directly sponsored Keys. To advance to the District Manager level a Supervisor had to have an organization reaching a retail purchase volume of \$7,500 for one month, and maintenance thereafter of a monthly purchase volume of \$3,000. One could not begin as a District Manager but had to work one's way to this position by recruiting at least five people at the Senior Key or Supervisor level or who had reached that level (CX 1G), and who together with their personal groups reached and maintained the foregoing monthly retail purchase volumes.

A District Manager earned 50 percent profit on personal sales, a 15 percent profit on sales to his Keys, 10 percent override on purchases of his Senior Keys, five percent override on his Supervisors' purchases, three percent override on the purchases of his directly sponsored District Managers' personal groups, and one percent override on purchases of indirectly sponsored District Managers' personal groups. He also earned a cash car allowance of

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\$150 if his personal group maintained a retail purchase volume of \$7,500 per month (CX 74M).

12. *Regional Manager*—The highest level one could reach under the Symbra'ette program was that of Regional Manager. A Regional Manager bought his products at a 55 percent discount from Symbra'ette. A Regional Manager could recruit an unlimited number of distributors. The personal group of a Regional Manager included his directly sponsored District Managers' entire groups, his directly sponsored Supervisors' entire groups, his directly sponsored Senior Keys' entire groups, and his directly sponsored Key Distributors. A District Manager's personal group had to include at least three (3) "qualified direct District Managers" and two (2) "qualified indirect District Managers" (CX 1G), and had to attain a retail purchase volume of \$25,000 in one calendar month in order to entitle such District Manager to ascend to the position of Regional Manager. Thereafter, a monthly minimum retail purchase volume of \$12,500 was required to remain at this level of the program.

A Regional Manager earned 55 percent profit on personal sales, a 20 percent profit on purchases of his Keys, a 15 percent override on his Senior Keys' purchases, a 10 percent override on his Supervisors' purchases, a five percent override on his directly sponsored District Managers' purchases, and three percent override on his directly sponsored Regional Managers' personal group's purchases, a one percent override on indirect Regional Managers, and a one percent override on indirect District Managers. He also earned a \$200 cash car allowance if a \$17,500 monthly re-

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tail purchase volume was maintained by his personal group.

Promotion of the Symbra'ette Program to the Public

13. Respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen promoted the Symbra'ette marketing program to the public in a variety of ways including use of promotional literature and a film designed to assist recruiting (CX 74, 75 and 82), and by media advertising (CX 2A and B) and direct mail solicitation for the same purpose (CX 1). Substantial success was achieved. As noted, sales volume grew from a relatively minor figure in 1965 to over \$2,054,000 in 1969, the year before the Commission's investigation commenced.

*(a) Symbra'ette's Promotional Literature**(1) The Flip Chart*

14. The statements and representations of respondents holding out to prospects the lure of earning large sums of money by investing in a Symbra'ette distributorship, and obtaining thereby the right to build a personal organization through the unlimited recruiting of additional distributors, and by such recruiting to obtain the large commissions, overrides, and other compensation held out as flowing from such a personal organization, are illustrated by a promotional aid known in the Symbra'ette organization as the "Flip Chart" (CX 75), by the "Sales Manual" distributed by respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen (CX 74), and by the pamphlet "Your Opportunity with Symbra'ette" used in direct mail advertising (CX 1).

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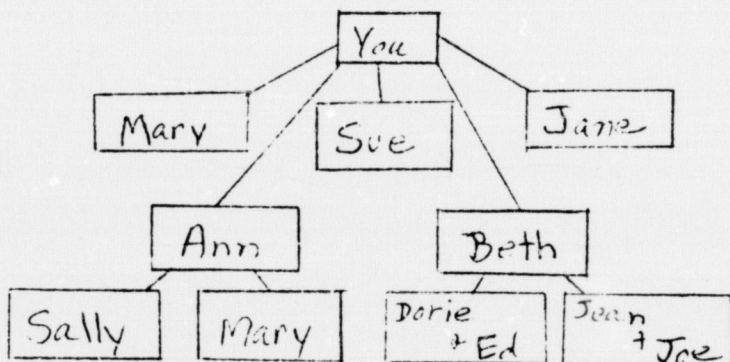
15. The "Flip Chart" (CX 75) was published by respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen, and was used to recruit Symbra'ette distributors by describing and representing its program to them (CX 92(14); Meredith, Tr. 61-65; Sanford, Tr. 204). The "Flip Chart" makes representations of great earnings to prospective participants which, however, could only be realized by every participant through an ever expanding number of new distributors.

16. The "Flip Chart" set out to prospective recruits the terms, structure and form of the Symbra'ette program. The five level "pyramid" distribution system, the requirements, represented opportunities, activities, and earnings of "Key Distributors," "Senior Keys," "Supervisors," "District Managers" and "Regional Managers" were described. The unlimited recruiting of distributors, and the Symbra'ette system of compensation were also pictured. The "Flip Chart" represented to prospective distributors the large amounts of money available through the Symbra'ette program based on a system of commissions, discounts, overrides, and other compensation, geared to an ever-widening circle of new recruits to be obtained by each new distributor, by their recruits, and by their recruits' recruits, etc., in building each distributor's personal organization. The following are taken directly from the "Flip Chart":

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"SYMBRA'ETTE USES THE SPONSOR
SYSTEM TO BUILD SALES ORGANIZATIONS
IT WORKS LIKE THIS
YOUR PURCHASES PLUS THE PURCHASES
OF THOSE YOU SPONSOR ARE ACCUMULATED
TO TOTAL YOUR OWN PURCHASE VOLUME
IN A GIVEN MONTH" (CX 75T).

* * *



* * *

"WHEN YOU DO THE ABOVE JOB
AND INTRODUCE ONLY ONE NEW KEY
DISTRIBUTOR IN A MONTH ...
YOU QUALIFY AS A SENIOR KEY
SO NOW LET'S LOOK AT YOU AS
A ... SENIOR KEY" (CX 75X).

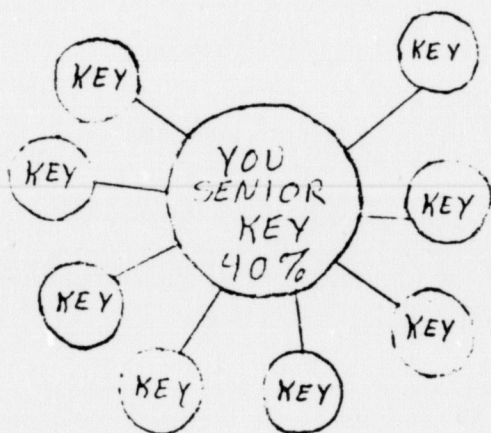
* * *

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* * *

"YOU AS A SENIOR KEY



- YOU [BUY DIRECT FROM COMPANY
[CAN RECRUIT YOUR OWN ORGANIZATION
[EARN 40% PROFIT
[ARE A WHOLESALER (SELL TO KEYS)
[EARN 5% PROFIT ON SALES TO KEYS
[HAVE A TREMENDOUS GROWTH OPPORTUNITY" (CX 75Y).

* * *

"WHEN YOU [as a Senior Key] SELL
\$1,000 R.P.V. AND HAVE ONLY 5-KEYS
BUYING THEIR PRODUCT FROM YOU

YOU WILL EARN

YOU SELL	\$1,000 X 40%	= \$400
5-KEYS X \$700	\$3,500 X 5%	= \$175
	PER MONTH	<u>\$575"</u> (CX 75Z)

* * *

"AS YOUR ORGANIZATION GROWS ...

SO DOES YOUR INCOME

YOUR R.P.V. IS NOW MORE THAN
THE \$3,000 A MONTH NEEDED TO
ATTAIN THE SUPERVISOR LEVEL" (CX 75Z1).

* * *

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* * *

"WHAT DOES A SUPERVISOR MEAN IN \$?"

YOU
EARN [45% PROFIT ON PERSONAL SALES
[10% PROFIT ON SALES TO KEYS
[5% OVERRIDE ON SENIOR KEYS
[2% OVERRIDE ON DIRECT SUPERVISORS

YOU ARE ELIGIBLE TO QUALIFY FOR CAR ALLOWANCE" (CX 75Z2).

* * *

"A SMALL ORGANIZATION LIKE THIS
CAN GIVE YOU [Supervisor] THE
FOLLOWING INCOME ...

5-SENIOR KEYS X 1000 RPV =	5000 X 5%	-	\$250
SALES TO KEYS	2000 X 10%	-	\$200
CAR ALLOWANCE			\$100
PERSONAL SALES	1000 X 45%	-	\$450
			<u>\$1000</u>
			PER MONTH

THIS VOLUME WOULD GIVE YOU MORE THAN THE NECESSARY 7,500 R.P.V. TO QUALIFY FOR DISTRICT MGR." (CX 75Z3).

* * *

"DISTRICT MANAGERS

EARN [50% DISCOUNT ON R.P.V.
[15% ON SALES TO KEY DISTRIBUTORS
[10% OVERRIDE ON DIRECT SENIOR KEYS
[5% OVERRIDE ON COMBINED TOTAL R.P.V.
[OF SUPERVISORS AND THEIR SENIOR KEYS

EARN [3% OVERRIDE ON DIRECT DISTRICT MGRS.
[1% OVERRIDE ON INDIRECT DISTRICT MGRS.

D.M. CAN EARN \$150 PER MONTH CASH CAR ALLOWANCE" (CX 75Z4).

* * *

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"SYMBRA'ETTE DISTRICT MANAGER ORGANIZATION

	R.P.V.	
DIRECT DM VOLUME	50,000 X 3%	= \$1,500.00
INDIRECT DM VOLUME	20,000 X 1%	= 200.00
SUPERVISOR	27,000 X 5%	= 1,350.00
DIRECT SENIOR KEYS	12,000 X 10%	= 1,200.00
WHOLESALE TO KEYS	2,000 X 15%	= 300.00
CASH CAR ALLOWANCE		150.00
		<u>\$4,700.00</u>

\$4,700 \$56,400
PER MONTH PER YEAR" (CX 75Z5).

* * *

"REGIONAL MANAGERS

EARN	[55% DISCOUNT OF R.P.V.	
	[20% ON SALES TO KEYS	
	[15% OVERRIDE ON DIRECT SENIOR KEYS	
	[10% OVERRIDE ON DIRECT SUPERVISORS	
	[5% OVERRIDE ON DIRECT DISTRICT MGRS.	
EARN	[3% OVERRIDE ON DIRECT REGIONAL MGRS.	
	[1% OVERRIDE ON INDIRECT REGIONAL MGRS.	
	[1% OVERRIDE ON INDIRECT DISTRICT MGRS.	
	[\$200 MONTHLY CASH CAR ALLOWANCE" (CX 75Z8).	

* * *

"SYMBRA'ETTE REGIONAL MANAGER ORGANIZATION

	R.P.V.	
DIRECT DISTRICT MGR. VOLUME	\$50,000 X 5%	= \$2,500
INDIRECT DISTRICT MGR. VOLUME	20,000 X 1%	= 200
SUPERVISOR VOLUME	20,000 X 10%	= 2,000
DIRECT SENIOR KEYS	10,000 X 15%	= 1,500
WHOLESALES TO KEYS	2,000 X 20%	= 400
1-DIRECT REGIONAL MGR. VOLUME	15,000 X 3%	= 450
IN-DIRECT REGIONAL MGR. VOLUME	30,000 X 1%	= 300
CASH CAR ALLOWANCE		200
\$7,550 PER MO.	\$90,600 PER YR.	(CX 75Z9). <u>\$7,550"</u>

* * *

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* * *

*"YOU HAVE SEEN HOW YOU MAY START AS
A KEY DISTRIBUTOR & GROW TO BE A . . .*

REGIONAL MANAGER

YOU MAY START YOUR SYMBRA'ETTE BUSINESS
IN ANY BRACKET YOU DESIRE
SUPERVISOR . SENIOR KEY
KEY DISTRIBUTOR" (CX 75Z11).

* * *

"TOP LEVEL UNDER THE COMPANY IS THE
REGIONAL MANAGER

(ANYONE CAN ACHIEVE THIS LEVEL)" (CX 75R).

* * *

17. Each Symbra'ette distributor started his association with Symbra'ette by completing an application from his sponsor and purchasing a Symbra'ette inventory in the bracket he desired to work in (CX 75Z15).

(2) *The Sales Manual and Direct Mail Brochure*

18. The "Sales Manual" (CX 74) reiterated many of the statements and representations set out in the "Flip Chart." The "Sales Manual," like the "Flip Chart," clearly discloses that mounting the ladder of success within the Symbra'ette organization from "Key Distributor," to "Senior Key," to "Supervisor," and then to "District Manager" and "Regional Manager," and receiving the commissions, overrides, and other compensation held out, depended upon each new distributor building a personal organization by recruiting other new distributors, who in turn had to build their own "personal groups" by sponsoring their own new recruits in

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an ever-widening chain. Commissions, overrides, and other compensation, were represented as growing ever larger in this manner (CX 74). Thus, the "Sales Manual" urged:

"RECRUIT . . .

YOU can't make it to the top ALONE . . .

The opportunity with the Symbra'ette bra and other Symbra'ette products is as challenging in many respects as mountain climbing. A person gets to the top through the cooperative efforts of those in his group. The one at the top in turn helps those with him to boost themselves to a higher plateau. The line that holds them together is the line of sponsorship . . .

There are potential recruits everywhere!" (CX 74L).

The direct mail brochure (CX 1) contained statements and representations similar to those in the "Sales Manual," and also set out many of the details of the Symbra'ette program found in the "Flip Chart."

(b) *Testimony of Former Symbra'ette Distributor*

19. A former Symbra'ette distributor testified in this proceeding describing the system in practice, as follows:

Q. "How did you first learn about Symbra'ette? A. A person that I had been previously acquainted with, by the name of Jerry Vinett, called me from Nashville, Tennessee."

Q. "During that phone conversation, what did Mr. Vinett say to you and what did you say to him? A. Well, Mr. Vinett told me that . . . they had a product

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where their method of operation was that you would recruit people and you would train people to recruit. . . . Well, you would just grow and grow and grow. . . .” (Tr. 47).

* * *

A. “. . . And then, he [Mr. Vinett] took blank paper just like a tablet, and tried to emphasize the method of recruiting to where he’d, say, put a circle at the top, which would indicate my wife and I, and then, drawing lines off—like five lines off of that circle to indicate five of our recruits, and then drew lines off of our recruits and drew circles to indicate our recruits, recruits, and then, drew lines off of our recruits, recruits, and drew five circles to indicate our recruits, recruits, recruits, and then, he ran out of paper” (Tr. 53).

* * *

Q. “Were both of you active in the Symbra’ette program? A. Yes.

Q. How did that work? A. Well, my first efforts were finding some recruits. At the same time, Yvonne did some selling and had some parties. And she made an effort to get recruits at her parties. And I spent all my time recruiting” (Tr. 59).

With respect to commissions and overrides based on an ever-widening organization, this witness testified:

A. “. . . Then he [Mr. Vinett] went ahead to explain the overrides that we would gain by—off our recruits . . . [H]e indicated that if we bought in at a higher level . . . this would qualify us to draw more money off

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of our recruits, as we recruited them. And it would also allow us to draw more and more off of the recruits that they recruited" (Tr. 53-54).

* * *

Q. "You also described or used the term 'buy-in' and clarified it a little bit. When you paid \$742, at the time you signed the contract, what did you understand you had purchased for that \$742? A. My personal understanding was that I had purchased the privilege of recruiting people and being paid override on these people. I realized that there was some inventory and supplies involved and, of course, you needed this inventory and supplies to show to people to recruit people" (Tr. 99).

* * *

*Respondents Held Out To All Prospects
The Opportunity Of Large Earnings
From A Symbra'ette Distributorship*

20. The theme running throughout respondents' promotional literature is that great profits were available to each and every investor in a Symbra'ette distributorship. Thus, in the "Flip Chart," as just set out, prospective distributors were told that the top distributor level under the program is the Regional Manager and that "ANYONE CAN ACHIEVE THIS LEVEL" (CX 75R). Shortly thereafter the "Flip Chart" informs prospects that a Regional Manager's organization produces an income of "\$7,550 Per Mo." and "\$90,600 Per Yr." (CX 75Z9). At the lower level of "Senior Key," requiring an initial investment of about \$700, each and every prospect was led to believe that a monthly income of \$575 could be obtained. The pamphlet

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"Your Opportunity with Symbra'ette" (CX 1) advised prospects that the program offered to people "from all walks of life" "regardless of who you are, where you are from, or what you are now doing" the opportunity:

"... to earn middle to upper five figure annual incomes, working full time" (CX 1C).

Prospects were advised that the ambitious person:

"... can start small or as large as he desires. Consultants can rapidly work into higher income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor" (CX 1E).

Respondents advertised in periodicals seeking investors in a Symbra'ette distributorship stating "YOUR MARKET HALF THE POPULATION," "YOUR PROFIT PROGRAM UNIQUE IN THE INDUSTRY," and representing:

"... Once you establish your Symbra'ette distributorship, it almost grows by itself. . . . The potential is astronomical—and the surface has barely been scratched. You can still get in on the ground floor . . ."

"... You can start as small or big as you wish—and grow from there, *expanding your sales organization and collecting automatic overrides on all the sales made by consultants under you . . .*" (CX 2B) (Emphasis added).

The "Sales Manual" used in recruiting represented:

"The Symbra'ette sales program offers more than just security for you and your family. It offers, indepen-

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dence, a promising future, a retirement plan and an income substantial enough so that you can afford the luxuries, as well as the essentials of life. . . .

We know of many who have achieved this goal within a year. Their success story can be yours too!!" (CX 74B).

Key Distributors were represented as making \$220 to \$317 a month, Senior Keys \$575 per month, as just noted, Supervisors \$1,000 per month, District Managers \$4,700 per month, and Regional Managers, as also noted, \$7,550 per month (CX 75).

Testimonials in the *Symbra'ette News* emphasized the large sums to be earned:

"June 2, 1972

Dear Mr. Simonsen:

. . . Mr. Simonsen, our satisfaction and happiness has not come only because of the fabulous income that we now receive as Regional Director, . . . Symbra'ette has enriched our lives in a material way by giving us a long dreamed about swimming pool, a new Pontiac station wagon, a new pick-up truck for camping, a newer and lovelier home, a nice serviceable office and we could go on and on . . .

Forever gratefully and
respectfully yours,

Edith Gustin" (RX 10).

• • •

*Initial Decision***"KILLER KERNS: (Juanita Kerns)**

Says to all new recruits, "Dreams come true in '72!"

Started at zero, January 4, 1971, one year later has \$1,200 in bra inventory, mobile home and a new car. . . .

Aims for a showing every night and a recruiting opportunity every day. . . ." (RX 10).

Advertisements in periodicals likewise lured prospects with the representation of large earnings:

"You too can open a world of new financial opportunity as a Symbra'ette Consultant, part or full time . . . offering qualified consultants up to 60% discount, plus a cash car allowance up to \$250 monthly" (CX 2A).

21. Advancement from Key Distributor, or other level at which a participant "bought-in" to the Symbra'ette program, up the ladder of the Symbra'ette "pyramidal" organization, and achievement of the earnings of such higher distributional level, was represented by respondents as a reasonable expectation, feasible and possible for each and every recruit (CX 1, 74-75, prior findings).

Geometric Progression

22. The achievement of the large earnings, and the advancement of *all* participants in the Symbra'ette program to higher levels, represented by respondents as expectable, feasible and possible for all, could only be accomplished by the building of personal organizations by all participants

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through recruiting of new distributors, by recruiting by such new recruits, and by their recruits, *ad infinitum*. Thus, for example, to achieve the \$575 per month held out by the Symbra'ette program, a Senior Key had to recruit into his organization a sufficient number of Key Distributors, suggested by the "Flip Chart" as five (5) or more (CX 75Y and Z), so that the group as a whole would attain a combined monthly retail purchase volume (R.P.V.) of \$4,500 of Symbra'ette products producing the foregoing income. Each Key Distributor recruited, in turn had to recruit one or more additional Key Distributors to advance to Senior Key (CX 75X). Also, to advance to Senior Key a Key Distributor's "personal group" had to have a retail purchase volume (R.P.V.) of Symbra'ette products of \$1,000 in one calendar month (CX 74G), and had to maintain \$500 per month to remain in that category. A Supervisor, to achieve the \$1,000 per month earnings represented, had to recruit in addition to his personally sponsored Key Distributors an organization of Senior Keys, also suggested by the "Flip Chart" as five (5) or more (CX 75Z3), each of which, as just stated, had to recruit his own organization of Key Distributors to achieve the earnings represented and to advance in his turn to Supervisor and higher. The same recruiting factors applied to District Managers and Regional Distributors.

23. The Symbra'ette marketing program thus contemplated and required for each and every participant to achieve the earnings and benefits represented, an ever increasing group of distributors in accordance with the principles of geometric progression.

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24. By geometric progression, if an organization were to increase monthly using a function of five (5) as a continuous function, or even a function of two (2) continuously (see De Vassenaar, Tr. 279), at the end of a relatively modest period of time there would be total saturation of the market. In fact, recruits to such an organization theoretically would soon equal the adult population of the nation as a whole.

25. Unlimited, geometrical increases in the number of recruits into the Symbra'ette marketing program constituted an impossibility. Achievement of the large earnings and advancement held out by respondents to all participants entering the program by recruiting their own "organizations" or "personal groups" in accordance with the Symbra'ette marketing plan, and obtaining commissions, overrides and other compensation represented, was impractical and impossible for each and every such recruit, or even for any substantial proportion of them. The great earnings and advancement held out by respondents to all prospective participants in the Symbra'ette program were therefore false, misleading and deceptive.

Chance

26. Uncertainty or chance was at the core of the Symbra'ette marketing plan insofar as the plan held out to prospective participants the promise of large earnings by way of commissions, overrides, and other compensation on sales by a prospective participant's recruits, by the recruits of those recruits, and so on. The continuation of the recruiting chain obviously was wholly beyond the control of any participant in the Symbra'ette program. The success of

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a Symbra'ette distributor's recruits in obtaining their recruits, and of those recruits in obtaining other recruits, etc., producing large earnings for the original distributor in the form of commissions, overrides, and other compensation, was entirely a "gamble" for any particular Symbra'ette participant.

Vertical Price Fixing

27. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors ("Consultants") whereby all distributors upon becoming participants in the Symbra'ette program agree to maintain the resale prices established by the respondents. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors whereby all distributors upon becoming participants in the Symbra'ette program agree on the fees, bonuses, discounts, rebates and overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors. Each distributor agreement signed by respondents and each individual distributor involved contained the following provision (CX 11-22):

"As a condition of this agreement, I agree to purchase and sell Symbra'ette products according to the procedure set forth in the Sales Manual and referred to in the Rules and Regulations. Said Rules and Regulations are an integral part of this agreement and by this reference are incorporated herein, and I agree to abide by any and all of the terms and conditions set forth therein, and any amendments thereto."

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The "Sales Manual" which all distributors and respondents thus agreed and understood would be abided by in making sales, and with which all distributors were required by respondents to abide by in making sales, provided (CX 74P):

"... you buy Symbra'ette products at wholesale prices—to be sold through personal sales direct to the public at suggested retail prices. . . ."

The Symbra'ette suggested resale prices are contained in the forms for ordering Symbra'ette products (CX 24-46).

Customer Restrictions

28. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors whereby all distributors upon becoming participants in the Symbra'ette program agree not to compete for each others' customers. Respondents and their distributors have agreed that each customer belongs to the distributor who originally acquired that customer. The "Sales Manual" which, as stated, all distributors agreed to follow, provided (CX 74N):

"A retail customer belongs to the Consultant who obtains the order. A consultant retains his customers as long as he continues to service them properly"

Purchase Restrictions

29. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors which required all Key Distributors upon be-

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coming participants in the Symbra'ette program to purchase merchandise only from their sponsors, and which prevented, restricted and prohibited Key Distributors from purchasing from a Symbra'ette distributor other than their sponsor. This restriction is illustrated by an announcement by respondents in their *Symbra'ette News*:

"We are receiving orders from Key Consultants who seem to have the impression that they may order direct from the Company. The ordering policy is that Keys must order through their sponsors.

Please ensure that all new recruits be instructed accordingly" (RX 12).

The "Sales Manual," "Flip Chart," and pamphlet "Your Opportunity With Symbra'ette," all likewise provided that "Key Distributors purchase their products from their sponsor" (CX 74D). The Sales Manual further provided:

"If a Consultant prefers to be transferred to another Sponsor for more convenience, he must have the approval of his Sponsor and his District Manager and Regional Manager, and a letter to that effect must be presented to the Home Office for approval."

Retail Outlet Restrictions

30. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors which require all distributors to restrict the retail sales and the display of Symbra'ette products only through authorized retail channels, i.e., direct home sales, home service routes, exclusive boutiques or similar estab-

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lishments where custom fitting is done, and establishments where no competitive line is sold. Sales to commercial retail markets are not authorized. The "Sales Manual" which, as stated, all Symbra'ette distributors and respondents agreed and understood would be followed in making sales, and which all distributors were required by respondents to follow in making sales, provided (CX 74P):

"Symbra'ette products are not to be sold in retail stores. Only exclusive boutiques or similar establishments where custom fitting is done, and no competitive line is sold can be considered as acceptable"

Discussion

The Symbra'ette marketing plan had a dual nature. It was an open-ended, multi-level (pyramidal) plan, and it also had a "direct selling" aspect. A distributor could make a profit on direct sales to consumers. However, as has been made clear in the findings set out hitherto, the large earnings held out by the Symbra'ette system, directly and by implication, to potential investors in a Symbra'ette distributorship required the development by every prospect of his own "organization" or "personal group" made up of his recruits, and their recruits, etc. It is this aspect of the Symbra'ette program with which the complaint is concerned. Respondents often confuse these two aspects in their briefs, treating the complaint at times as involving an attack on the "direct selling" phase of the Symbra'ette program. It was stipulated that "[t]here is no contention that any deception, fraud, unethical practice, misrepresentation, or improper conduct is present in the presentation of the

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[Symbra'ette] products or their prices to consumers" (CX 92(7)). Nothing herein will put respondents "out of business" insofar as their direct selling activities are concerned, and respondents suggestions on this score are misplaced (see Brief After Trial, pp. 6 and 39).

The assertion that the Commission's complaint is arbitrary and capricious because there are competitors selling brassieres, girdles, swimwear and lingerie under similar marketing and sales programs, who have not been challenged, wholly lacks merit. It is well established that the Commission does not have to proceed against every firm violating the law as a condition for proceeding against one. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958); *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

Respondents contend that many Symbra'ette distributors profited from the program and "received a good deal." From this respondents argue that to preclude persons who want to engage in "small business" from entering the program would be contrary to the public interest, and that the proper course of administrative conduct is to eliminate "abuse and misconduct" (Brief After Trial, p. 4). The elimination of "abuse and misconduct" is precisely the purpose of the order issued in this decision. As stated, nothing in it interferes with the lawful "direct selling" aspects of the Symbra'ette program.

The fact that some distributors found "direct selling" of Symbra'ette products a good deal, if true, and that some may have made money through recruiting and from sales of those recruits, and their recruits, etc., does not expunge

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the unfairness and deception inherent in the open-ended, multi-level (pyramidal) nature of the Symbra'ette program. A distinction must be made between achievement of substantial earnings and advancement in the Symbra'ette organization by an individual distributor, and the realization of the success and earnings held out by the respondents to *all* participants who were recruited. As the complaint alleged in Paragraph 11, if each new participant in the Symbra'ette system fulfilled the program set out in the "Flip Chart" and "Sales Manual" and succeeded in recruiting five new participants each month, and each of those new recruits succeeded in recruiting five recruits of their own, and so on, the number of distributors in the program would quickly number many millions, as already emphasized. Indeed, growth by a factor of two would produce the same result, only requiring a somewhat longer period.

The fact that enormous numbers of distributors were never actually recruited does not dissipate the deceptive nature of the program. For it is obvious, on the one hand, that the number of distributors must increase geometrically for the plan to provide each and every prospect with an "organization" or "personal group" yielding the returns represented and, on the other, that sustaining such a growth rate for any significant period is utterly impossible because of a lack of potential distributors, i.e., most or all of them would have been recruited. In short, the essence of the Symbra'ette program, aside from its direct-selling aspects, was inherently misleading and deceptive.

The holding out of great earnings from the open-ended, multi-level (pyramidal) Symbra'ette program, which was presented as a legitimate business enterprise, but which in

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reality was based on a chain of recruiting which was impossible, not only had the capacity to induce prospects unfairly and deceptively to invest substantial sums of money, but to cause them to make a commitment of their labor, time and energy. The latter could well have been one of the most insidious facets of respondents' false, misleading, and deceptive representations.

Respondents insist that condemnation of their program on the ground that it required continuous "geometrical" recruiting, which was impossible, is erroneous because it is purely theoretical and conjectural, and bears no relation to reality (Brief After Trial, pp. 19-20, 27-28, 30-32; Reply Brief, pp. 5, 20-22). The fact that the program did not work in practice as designed and no saturation of distributors occurred does not mean that the program must or should be held lawful. It is undeniable that the Symbra'ette program in fact had as its cornerstone "geometric" recruiting. As already pointed out, to achieve the represented earnings and to advance up the distributional level *required* recruiting of an "organization" or "personal group" by *every* participant (CX 1, 74-75). The very system of commissions and overrides contemplated recruiting. Yet, as reiterated, continuous expansion of Symbra'ette distributors was impossible. The program, in short, in its very nature and design contemplated and required an impossibility. The program was accordingly unfair and deceptive. Breaking of the chain of recruiting for reasons other than saturation and unavailability of recruits, and the fact that Symbra'ette distributors never numbered more than 3,635, does not negate this conclusion.

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Failure of geometric expansion of distributors to occur indicates only the difficulty of endless recruiting. Difficulty in carrying out an inherently deceptive and impossible program does not render that program lawful.

The Lottery Count

Count I of the complaint alleges that the Symbra'ette program was in the nature of a lottery and therefore violated Section 5 of the Federal Trade Commission Act. A lottery has traditionally involved three elements, consideration, chance, and a prize. *J.C. Martin Corp. v. Federal Trade Commission*, 242 F.2d 530 (7th Cir. 1957). In the Symbra'ette program the foregoing three elements would seem to be present. The money paid to respondents by the prospect for an inventory of Symbra'ette products for resale, which carried with it the right to recruit his own "organization" or "personal group" of distributors constituted "consideration." The commissions, overrides, and other compensation represented to each prospect as obtainable through the Symbra'ette marketing program from sales by the prospect's recruits, by their recruits, etc., constituted the "prize." The "chance" consisted of uncertainty generated by the unknown position of the prospect in the chain of recruiting at the time he joined the program, the effect of that position on the possibility of achieving the great earnings held out by the program and, especially, of uncertainty as to the success of the prospect's recruits in recruiting additional recruits, and of those recruits' success in recruiting yet other recruits, and so on.

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Respondents maintain that the Symbra'ette program does not constitute a lottery because the elements of "consideration" and "chance" are both lacking. According to respondents, "consideration" is lacking because a participant's payment under the program is "only for the purchase of merchandise and goods," and there is no "finder fee," "franchise fee," or the like (Brief After Trial, pp. 11-17; Reply Brief, p. 3). Put another way, respondents maintain that a participant does not pay a "consideration" for the right to recruit others, but pays only for an inventory of Symbra'ette products. In the opinion of the undersigned, this is a specious argument. The fact that there was no separate "finder fee," or "franchise fee," does not negate the existence of "consideration." Participants paid from about \$215 to \$1,950 to respondents to become "Key Distributors," "Senior Keys," or "Supervisors," and for this they received an inventory of Symbra'ette products and became distributors with the rights and privileges flowing therefrom, including the right to build their own organizations by recruiting. The payment to Symbra'ette clearly constitutes "consideration." These payments, moreover, contrary to respondents' assertions, were substantial.

As to "chance," respondents argue that uncertainty marks many business endeavors, and that "chance" must dominate over skill for this element to be present in a legal sense. This has been the subject of a prior finding, and is discussed later in this section. Uncertainty or "chance" was at the core of the Symbra'ette program in its non-direct selling aspects, and the element of "chance" in legal contemplation clearly was present in the program. The fact that classic lottery trappings, i.e., punch boards, raffle techniques, etc.,

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were not present has, of course, no bearing on the essential legal nature of the Symbra'ette program.

Almost 70 years ago, the Supreme Court in *Public Clearing House v. Coyne*, 194 U.S. 497 (1904), considered a scheme which was not significantly different in its basic principles from the recruiting aspects of the Symbra'ette program. In that case a "League of Equity" was organized which sought members, holding out large returns for a small investment and for work in inducing others to join. Each person who became a member paid three dollars as an enrollment fee, and agreed to pay one dollar a month for sixty months or five years. Each enrollee agreed to recruit others into the program. In this manner a fund or pool of money was created. In consideration of payments and recruiting of new members, each participant at a certain point in time was to receive a *pro rata* share of the fund or pool accumulated by the League in accordance with a formula based on its rate of growth. On these facts the Court stated (194 U.S. at 502):

"... the realization of any amount whatever by the new members is conditioned absolutely upon the constant acquisition of other new members and the new payments to be made by such new members. And what amount the members or cooperators will realize, as is stated by the league literature, depends entirely upon the ratio of growth of the league."

The Supreme Court concluded that the success of the scheme depended entirely upon the constant increase in the number of subscribers, that no one could predict what such growth would be, and that the resulting uncertainty

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generated deprived the scheme of the character of a legitimate business enterprise. The Court decided that the scheme was, in effect, a lottery, and that "chance" in application to the scheme meant (194 U.S. at 512):

"... something that befalls, as the result of unknown or unconsidered forces; the issue of uncertain conditions; an event not calculated upon; an unexpected occurrence; a happening; accident, fortuity, casualty."

The Court noted that "no scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise" (194 U.S. at 515).

The same rationale is fully applicable to the Symbra'ette marketing plan, and more recent cases have applied similar reasoning. A lottery was found to exist by the Court of Appeals for the Tenth Circuit in a referral sales scheme involving concepts analogous to those in the Symbra'ette program. *Zebelman v. United States*, 339 F.2d 484 (10th Cir. 1964). In that case the purchaser of an automobile was promised \$100 each time a person whose name he submitted also bought an automobile. The original purchaser likewise was promised \$50 for each person whose name was submitted by the new participant he had referred, and who purchased an automobile. Holding that chance constituted an integral part of the scheme rendering it a "lottery," the court stated (339 F.2d at 486):

"... the original purchaser has no control over the payment or receipt of the \$50 since it is the person whose name he submits that must locate another buyer. Insofar as the original purchaser is concerned, the

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procuring of this buyer is dependent, at least in part, upon chance and by the terms of the statute that is all that is needed. Thus, the third element is alleged and we must conclude that the indictment is legally sufficient to charge an offense under the statute."

In *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967), a somewhat similar scheme involving chain recruiting of new purchasers was involved. In this plan a water softener costing, if paid for in installments, about \$829 was demonstrated to a householder and his wife. If they were interested they were told that the softener not only could be obtained at no cost to themselves, but also that they would have an opportunity to earn a profit. They were to achieve this goal by supplying names of potential purchasers of the softener. For each such person whose name was supplied, and who bought a softener, the original purchasers would receive \$40. No limit was placed on the number of referrals that the original purchaser could supply. The original purchaser was to receive an additional \$40 for every referral who purchased a softener whose name was supplied by the referrals the original purchaser made. As in the case of the Symbra'ette marketing plan, achievement of the goal represented thus depended on endless referrals, i.e., recruiting. The Court of Appeals found this plan to be essentially fraudulent noting that one of its vices consisted of its "demonstrable impossibility." 380 F.2d at 672. See also *Fabian v. United States*, 358 F.2d 187 (8th Cir. 1966).

Litigation arising in state courts has similarly condemned selling plans offering benefits geared to chain referrals or recruiting by a participant, by his recruits, and by their

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recruits, etc. In *People of the State of Michigan ex rel. Kelly v. Koscot Interplanetary, Inc.*, 195 N.W.2d 43 (Mich. 1972), a distribution plan was involved which sought to create a network of 40,000 distributors throughout the United States, the "per capita" limit for any given community being one distributor for every 4,000 people. Substantial commissions were paid to distributors who brought in new distributors. "Single level" distributors sponsored prospects who in turn could sponsor other prospects so long as distributorships were available. "Dual level" distributors recruited and supervised subdistributors called "Supervisors" who purchased from the sponsoring distributor at 45 percent off retail list. A "Supervisor" could ascend to the distributor level if sponsored by a distributor, and was approved by Koscot, provided he first replaced himself with another "Supervisor." The Michigan Court of Appeals agreed that this plan was analogous to a chain letter, "identical to the devices of referral selling," and that it constituted a "lottery" prohibited by Michigan statute. The court found all three elements of consideration, chance, and prize to be present, noting as to "chance" (195 N.W.2d at 54):

"... if 'A', a distributor, brings 'B', a prospect, to a meeting and 'B' purchases a supervisorship, and 'B' in turn brings 'C' to another meeting, and 'C' purchases a supervisorship; 'A' makes money from both 'B' and 'C', with 'C' being outside 'A's' knowledge and control. This constitutes chance dominating over skill.

In many instances there is virtually no contact maintained after a person is sold a franchise by defendadnt. He can move anywhere in the country and yet the per-

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son who recruited him will receive profits from whatever he does."

In considering the matter the Michigan Court of Appeals analyzed a number of similar distribution and marketing schemes utilized over the years. In *Twentieth Century Company v. Quilling*, 110 N.W. 174 (Wisc. 1907), the owner of a patented "pole and thill coupling" (for buggies and carriages) devised a scheme by which he sold to participants the exclusive right to market his device in a given county, with the right to sell to others exclusive territorial rights in other counties, with those purchasers having the right to sell exclusive county rights to still others, "and so on without limit." Finding the project not a legitimate business enterprise, the Wisconsin court noted that it "contemplates an endless chain of purchasers, or, rather, a series of constantly multiplying endless chains" containing the possibility of large gains to the original promoters and early purchasers, but "losses to later purchasers, increasing in number with the greater success of the scheme." The Supreme Court of Wisconsin denounced the plan as "contrary to public policy and void." In *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160 (Wash. 1965), radio intercoms and fire alarm systems were sold at inflated prices, purchasers receiving the privilege to refer potential customers to the seller, who promised to pay \$100 for each sale to a prospect whose name was submitted, and \$200 for each 15 names submitted to whom the seller made a presentation. Even though the sales scheme did not involve payments on sales to referrals of referrals, the plan was nevertheless condemned by the Washington Supreme Court

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as a lottery and contrary to public policy. The Court observed that purchasers of the intercoms and fire alarms, in hoping to recoup their investment from referrals, took the "chance" that the referrals might not be interested, that the salesman might not adequately make his presentation, that the referral might already have been referred by someone else, that the market might be saturated, and that the salesman might not even contact the referral. The Court concluded that chance was an integral part of the plan, but noted that "the measure was not the quantitative proportion of skill and chance in viewing the scheme as a whole." The Court found the principle to be the same as in chain-letter schemes.

M. Lippincott Mortgage Investment Co. v. Childress, 204 So.2d 919 (D.C. of Appeal Fla. 1967), involved a plan very similar to that in the foregoing case except that commissions were to be paid to purchasers on sales made to referrals of referrals submitted by the purchaser. Purchasers were led to believe that "big money" would be made on sales to referrals of referrals because of their large number creating a potential yield of \$7,800 in commissions to the original purchaser. The Court found the plan a plain violation of the Florida statute prohibiting chain selling schemes, pyramid clubs, and the like. The Florida Court noted that the sale had been induced by representations that the promissory note signed by an original purchaser should be of "no concern" to him because purchasers could expect commissions which would more than pay the note in full, and because they would become part of a group which "would increase through a chain process of new members securing other new members and thereby advancing them-

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selves in the group where they in turn would receive commissions" (204 So.2d at 923).

There is no question, and persuasive authority has established, that a "pyramid" marketing or selling plan wherein the earnings accruing to any participant are dependent, as in the Symbra'ette program, upon recruiting of new recruits, on the recruiting by those recruits of still other recruits, etc., constitutes a "lottery" in legal contemplation. The Symbra'ette program was a lottery notwithstanding the absence of classic indicia thereof. The returns to any particular participant were beyond his control, and were determined by chance. Chance was an integral and inherent part of the program.

The fact that the program had a dual aspect, as stated, in that Symbra'ette distributors might engage in direct selling, making a profit on the difference in the price they paid for Symbra'ette products and the price at which they sold those products to the consuming public, in no way alters this conclusion. The circumstance that a program has a legitimate aspect does not render such a program lawful if conjoined with it there is an unlawful aspect. Nor does the fact that the success of a participant in obtaining new recruits, and building his "organization" or "personal group," was dependent in some measure on his skill in proselytizing and training change the nature of the program. Notwithstanding such factors, the returns ultimately realized from the sales of recruits, and of their recruits, etc., if any, were completely beyond a participant's control. Chance permeated the entire operation insofar as the non-direct selling aspects of the program were involved.

Lottery methods of merchandising have long been held to violate Section 5 of the Federal Trade Commission Act,

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Federal Trade Commission v. Keppel & Bro., 291 U.S. 304 (1933), and such have come to be viewed essentially as *per se* violations. See, e.g., *Gellman v. Federal Trade Commission*, 290 F.2d 666 (8th Cir. 1961); *Dandy Products, Inc. v. Federal Trade Commission*, 332 F.2d 985 (7th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); *Peerless Products, Inc. v. Federal Trade Commission*, 284 F.2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844 (1961); *Wren Sales Company, Inc. v. Federal Trade Commission*, 296 F.2d 456 (7th Cir. 1961). Considered as a "lottery" comparable to the foregoing cases, the Symbra'ette program would fall within a category of *per se* violations. Regardless of whether or not it should be so considered, the undersigned has not based this decision on any *per se* rationale, but on a careful consideration of the non-direct selling aspects of the Symbra'ette program, and there is no doubt that the open-ended, multi-level (pyramidal) aspects were unfair and deceptive. In its potentiality for unfair exploitation and oppression of the public the Symbra'ette program is quite different from, and far worse than, punch-boards, pull-tabs, or raffle type merchandising practices. It bears in this respect little or no resemblance to the practices involved, for example, in *Marco Sales Company v. Federal Trade Commission*, 453 F.2d 1 (2nd Cir. 1971), in which the Court of Appeals reversed and remanded a cease and desist order enjoining the sale of trinkets, etc., by means of a punch-board. In reversing *Marco*, the Second Circuit was of the view that the Commission had not adequately articulated why it had totally prohibited the punch-board sale of small items, but had allowed supermarkets and oil companies to utilize contests governed by chance in food

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sales and gasoline retailing. The court in *Marco*, however, did not rule that distribution of goods by lottery was lawful.

The sale of dolls, stuffed dogs, etc., by means of punchboards obviously bears no resemblance to respondents' program. Respondents' Symbra'ette marketing plan induces, and has the tendency and capacity to induce, prospects to invest substantial amounts of money, as well as valuable time, effort, energy, and hope, in a scheme the results of which are determined by chance, in which success is impossible for all, if not most, and in which the chance or gambling element is concealed and the program is deceptively promoted as a legitimate business opportunity. The amounts of money invested by the public in the Symbra'ette marketing plan, it may be added, were "substantial," contrary to respondents' assertion (Reply Brief, p. 3), and the undersigned specifically so finds.

The Symbra'ette open-ended, multi-level (pyramidal) marketing program, presented deceptively as a legitimate business opportunity, was inherently unfair, exploitive, and oppressive. It is clear from the provisions of the program, and its promotional literature, that it was aimed at persons hoping to go in business "for themselves," and at persons of possibly limited means seeking a way of supplementing their incomes. The program was cleverly designed to make "buying in" at the higher levels of Senior Key or Supervisor seemingly attractive, and the opportunity to achieve the high earnings held out by the "Flip Chart" deceptively plausible. The Symbra'ette program not only caused, or had the capacity to cause, participants to invest their money

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in the hope of realizing the income held out by respondents as available, when such realization was an impossibility for all recruits, but caused, or had the capacity to cause, them to recruit others including friends, relatives and acquaintances to invest money in a program inherently unfair and deceptive. Beyond that, the Symbra'tte program deprived, or had the capacity to deprive, participants of their time, energy and efforts which they otherwise could have devoted to legitimate enterprises not unfair to them.

A "pyramidal" marketing program such as respondents' "in the nature of a lottery," was described by the Iowa Supreme Court in *State of Iowa ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 628 (Iowa, 1971):

"Product sales and the selling of positions are effected via use of the aforesaid 'multi-level—distributorship—supervisor—pyramid sales techniques' through which individuals considering position purchases are induced to buy upon the assurance that once 'bought in' they will have the right to bring or refer other prospective merchandise-position buyers to the company and receive payments from Koscot for each such referral."

The Iowa Supreme Court found this program infected with fraud holding that although the term "fraudulent conduct" in the Iowa statute was not subject to precise definition, it did include referral or "pyramid" sales schemes. The Court determined that in outlawing merchandising programs with rebates "contingent upon procurement of prospective customers by the purchaser," i.e., programs in the

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nature of a lottery, the legislative purpose was to brand all pyramiding referral merchandise sales schemes as a "cancerous vice" against which the public should be protected and for that reason suppressed, 191 N.W.2d at 632. And in *State by Lefkowitz v. ITM, Incorporated*, 275 N.Y.S.2d 303 (1966), an endless chain selling transaction was determined to be so permeated with chance as to constitute a lottery, and was condemned on the ground that such a program had to fail as a matter of economic feasibility and mathematical certainty. Noting that this was the "quicksand" nature of such transactions the Court remarked that (275 N.Y.S. at 315):

"... promoters must be charged with knowledge of the fraud inherent in [them]."

See also with respect to sales and referral schemes based like the Symbra'ette program on "geometrically" expanding referrals or recruiting with chance ("lottery") at their core. *HM Distributors of Milwaukee, Inc. v. Dept. of Agriculture of State of Wisconsin*, 198 N.Y.2d 598 (1972); *Commonwealth v. Allen*, 404 S.W.2d 464 (Ky. 1966); *Kent v. City of Chicago*, 22 N.E.2d 799 (Ill. 1939); *New v. Tribond Sales Corp.*, 19 F.2d 671 (D.C. Court of Appeals 1927); and cases involving use of such schemes in an earlier day: *McNamara v. Gargett*, 36 N.W. 218, 22-21 (Mich. 1888); *Schmueckle v. Waters*, 25 N.E. 281 (Ind. 1890); *Merrill v. Packer*, 45 N.W. 1076 (Iowa 1890); *Hubbard v. Freiburger*, 94 N.W. 727 (Mich. 1903). A number of states have prohibited pyramid selling and referral schemes. *Minnesota*, Minn. Stat. Anno. (1966), §325.79, Subd. 2; *Wisconsin*, Wisc. Stat. Anno. (1973), 422, 416; *Iowa*, Code (1971)

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§713.24 (2b); *California*, Anno. Cal. Code (1970), Penal Code §327.

This proceeding involves practices clearly not comparable in any way with merchandising by punch-boards, or the like. Rather, there is involved a "pyramidal" program masquerading as a legitimate opportunity, attractive to people looking for a way to make a living or who need money, the returns from which, to the extent derived from non-direct selling, are governed basically by chance and beyond the control of participants. Such a "pyramidal" program is inherently unfair to those investing resources and time in it. The Symbra'ette program, as already stated, had the capacity to bilk gullible or uncritical members of the public out of substantial sums of money, and out of their time, energy and efforts. Respondents' suggestion that no one was injured, damaged or deceived is rejected. Beyond that, however, the Symbra'ette marketing plan unquestionably had the capacity and tendency to injure, damage or deceive, and that is sufficient. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Goodman v. Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957); *Montgomery Ward & Co., Inc. v. Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). Although the program never attained great size, it did grow rapidly, apparently until Commission intervention, and \$2,054,250 of volume in 1969 is by no means insignificant.

*The Symbra'ette Representations
Were Misleading and Unfair*

Count II and Count III of the complaint raise issues similar to those already discussed. Count II of the complaint

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charged that the Symbra'ette program involved "geometric" growth which was impossible, and therefore was unfair and deceptive. This aspect has been dwelt on at some length. It should be pointed out, however, that the nature of open-ended, multi-level (pyramidal) sales schemes, as in referral or chain-letter schemes, results in early entrants having a greater chance of achieving some success than later entrants. New entrants into the Symbra'ette program were deceived in two respects. They were falsely led to believe (1) that the earnings and advancement held out by the program was possible for *every* new entrant, and (2) that the chances of achieving success were the same for all entrants. Later entrants, however, had a lesser chance of success if the program were carried out as designed because of prior recruitment by earlier entrants, yet made the same investment as earlier entrants. The greater the degree of success achieved by earlier recruits the less the chances of subsequent recruits. The fundamental deception alleged in Count II, and proved by the very terms of the program, however, lay in the fact that the Symbra'ette program held out to all participants financial gains impossible for all.

Some comment should be made with respect to the contention of respondents that the Symbra'ette marketing plan emphasized *sales* of Symbra'ette products rather than *recruiting* (Brief After Trial, p. 21; Reply Brief, p. 4). There can be no doubt, however, that recruiting was a major element of the Symbra'ette program. Respondents' *Symbra'ette News* illustrates the emphasis on the practice of unlimited recruiting in the Symbra'ette system:

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"RECRUIT-A-THON REPORT

The list of Consultants [Distributors] earning points toward the prizes they have elected to win is really starting to grow by leaps and bounds. . . ." (CX 8C).

* * *

"ANOTHER SYMBRA'ETTE "EVERYONE CAN WIN" PROMOTION ! ! ! !

The only competition you have in this July-August recruiting promotion is yourself. You can earn \$50 or up to \$1,000 during this six week period, by recruiting new consultants into your group—and don't overlook the fact that you will continue to earn on your consultants as long as each of you remains in the Symbra'ette business, so you win both ways. . . . RECRUIT ! ! ! ! (CX 10C).

* * *

"FROM THE PRESIDENT'S DESK

Dear Consultant,

. . . . I would remind you that the Siminar recruiting contest, with its rich rewards, is now in full swing. This is a three month contest. . . .

Sincerely,

Carl G. Simonsen"

(RX 12; see also RX 9).

* * *

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"WEEKLY OPPORTUNITY MEETING here at our office! We have reserved MONDAY NIGHTS (by appointment) to talk to your potential recruits and show the 20-min. film. Make a habit of always being here with a guest. Let us help you build your organization!" (RX 91).

* * *

The Sales Manual in describing the functions of "Supervisor" stated:

"Supervisors not only recruit constantly, . . . but continue to function as retailers . . ." (CX 74H).

As to District Managers the Sales Manual stated:

"Basically, your role is that of recruiter, trainer and motivator. . . ." (CX 74I)

Symbra'ette News continuously exhorted distributors to recruit (CX 7-10). Distributors in March 1970 were told:

"THIS TINY AD PRODUCES RESULTS FOR JUNE
DALTON

Help Wanted—Female

FIVE ladies wanted who would like to work part-time making full-time pay. . . ." (CX 8A).

Letters were emphasized with a "recruiting" theme:

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"DO YOU HAVE TIME TO RECRUIT?

On our way home from Dayton, we stopped off in Louisville, Kentucky just long enough to recruit 'SymbraEtte by Dot and Shirley'." . . . (CX 8F)

"Lillian, Adeline. . . ., Judy . . . and myself made a trip to the New York area to recruit . . . " (CX 9F)

"LATEST
'RECRUIT-A-THON'
LIST

. . . Every recruit they've signed is worth *points* in the forthcoming drawing.

You say *you're* recruiting? But you don't see your name on this list. Better check up and make sure that you sent the Home Office *full details* on your recruits . . .

Get out there now and RECRUIT!" (CX 9F)

"GRAND PRIZE
1970 CADILLAC COUPE de VILLE
in
SYMBRA-ETTE Recruit-athon" (CX 9H)

"Can you see yourself now embraced by a magnificent Mink Coat? It can be yours if you get out there *now* and recruit, Recruit, RECRUIT." (CX 9H)

"Recruiting is surely one of the best ways Symbra'-ette Consultants have of sharing their happiness. (CX 10B).

"If you are a *head hunter* and merely go about *signing* people up and failing to train them, you are not operating by the SymbraEtte Creed . . .

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"Help your new people get started . . . and when they are ready to start recruiting help them with this also" (CX 8B).

"She [a recruit] knew that the only way to reach her high goals was to *build an organization of good consultants* who had the ambition to advance in the Symbra'ette Company" (CX 9F) (Emphasis added).

Count III charges that respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen, represented to all potential Symbra'ette participants that it was not difficult for participants in the Symbra'ette program to ascend to higher levels of distribution increasing their earnings in accordance with the representations made by respondents, that every participant had the reasonable expectancy of large profits or earnings, and that the Symbra'ette program was commercially feasible for all recruits.

The record herein establishes that these representations were made, and that all were false, misleading, and deceptive. It is difficult for entrants at the Key Distributor, Senior Key, and Supervisor levels to ascend to ever higher levels of distribution, and impossible for every, or even most, entrants at the foregoing levels to do so. All participants in the Symbra'ette program do not have the reasonable expectancy of building "organizations" or "personal groups" producing the large profits or earnings represented by respondents, and the Symbra'ette "pyramid" program is not commercially feasible for all participants.

Restraints of Trade

With respect to the allegations of vertical price fixing contained in Count IV of the complaint, Symbra'ette dis-

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tributors by contract agreed to adhere to the rules and regulations set out in the "Sales Manual" (CX 11-22, 74, 87). Respondents in this manner fixed the prices at which its distributors could resell Symbra'ette products. It is elementary that vertical price fixing outside the limits of fair trade is unlawful and constitutes a *per se* violation of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441 (1922); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Parke, Davis, & Co.*, 362 U.S. 29 (1960); *Lenox, Incorporated v. Federal Trade Commission*, 417 F.2d 126 (2nd Cir. 1969). The existence of vertical price fixing agreements is sufficient for a violation. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944). The Symbra'ette program with its system of discounts and overrides inherently contemplated that all distributors would resell Symbra'ette products at the prices fixed by respondents, and in effect controlled the resale prices of Symbra'ette distributors. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Symbra'ette, as alleged in Count V, restricted distributors from selling to the customers of other distributors, prevented distributors from buying Symbra'ette products from each other, except for Key Distributors who were required to purchase from their sponsors and no others, and prohibited distributors from reselling Symbra'ette products to retail stores "except exclusive boutiques" where "no competitive line is sold" (CX 11-22, 74, 87).

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Such restrictions are plainly unlawful where respondents have sold their Symbra'ette products to distributors and have parted with dominion over them. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court there stated (388 U.S. at 379):

“Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. . . . Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.”

Restrictions on disposition of Symbra'ette products after distributors had bought them were part of respondents' resale price maintenance agreements, and as such must be considered as part of a total package of unlawful restraints. *United States v. Sealy, Inc.*, 388 U.S. 350, 357 (1966).

*Revisions in Symbra'ette Program
after Complaint*

On April 1, 1972, about five months after the complaint issued respondents revised their Symbra'ette program in some respects (CX 92(3) and (4)). The program as it existed prior to complaint and until the foregoing date, and the program as revised, have been interwoven to some extent in respondents' "Brief After Trial" and "Reply

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Brief." This initial decision, however, has been concerned exclusively with the Symbra'ette marketing plan as it was being utilized at the time the Commission issued its complaint, and for some years prior thereto.

Among other revisions, respondents have changed the program to provide that the cost of the initial inventory of Symbra'ette products to be purchased by participants is refundable within 90 days at the "sole election of the purchaser", and that the number of active "Consultants" is "limited to 1/10 of one percent of the population of each state taken respectively."

It is by no means clear that these revisions remove the objectionable features of the program. See *People of the State of Michigan ex rel. Kelley v. Koscot Interplanetary, Inc.*, *supra*. In any case, revision of the program after complaint in no way inhibits the entry of a cease and desist order. *Coro, Inc.*, 63 F.T.C. 1164, 1178-1201 (1963), modified and aff'd, *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954; *Goodman v. Federal Trade Commission*, *supra*; *Skylark Originals, Inc.*, CCH Trade Reg. Rep. 1970-73 Transfer Binder ¶19,946 (Order of March 9, 1973).

The Order

The order entered herein is intended to remedy the unfair and deceptive aspects of respondents' open-ended, multi-level (pyramidal) Symbra'ette marketing plan and to prevent their resumption in similar or related forms, but to permit respondents to continue all lawful direct selling aspects of their business. The order would also prohibit continuation of the unreasonable trade restraints

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challenged in Counts IV and V of the complaint and found to have existed.

CONCLUSIONS

1. The Federal Trade Commission has, and has had, jurisdiction over respondents, and the acts and practices charged in the complaint, and involved herein, took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents, as demonstrated in the findings of fact and discussion set out earlier herein, engaged in false, misleading and deceptive acts and practices, and utilized unfair methods of competition in the offering for sale, sale and distribution of their Symbra'ette products, and in the promotion and operation of the Symbra'ette marketing program.

3. Such false, misleading and deceptive acts and practices, and unfair methods of competition, had the tendency and capacity for and were to the prejudice and injury of the public and of respondents' competitors, and constituted violations of Section 5 of the Federal Trade Commission Act.

4. As a consequence of the foregoing, and of the findings of fact and discussion set out earlier herein, the following order should be entered:

ORDER

IT IS ORDERED that respondent Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate

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name is now Symbra'ette, Inc., and officers thereof, and respondent Carl G. Simonsen, individually and as an officer of said corporation, or corporations, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of brassieres, girdles, lingerie, wigs, or of any other products, or of distributorships or franchises, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering, operating, or participating in, directly or indirectly, any open-ended, multi-level (pyramidal) marketing or sales plan or program wherein the financial gains to participants are dependent in any manner or to any degree upon the continued recruitment of other participants.
2. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants are, or are represented to be, based in any manner or to any degree upon the recruiting of other participants who obtain the right under the plan or program to recruit yet other participants.
3. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants depend in any manner or to any extent, expressly or impliedly, on the number of participants increasing in a geometrical progression, whether infinite or not.

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4. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program which is in the nature of a lottery.
5. Offering, presenting, or promoting, directly or indirectly, any marketing or sales plan or program as a legitimate business opportunity when the financial gains to participants therefrom are in fact dependent on chance and substantially beyond the control of participants so as to prevent them from significantly affecting, by application of effort, skill, or judgment, the amount of financial gains achieved.
6. Offering to pay, paying, or authorizing payment of any override, commission, cross-commission, discount, bonus, rebate, dividend, or other consideration to any participant in any marketing or sales plan or program in connection with the sale of any products or services unless such participant performs a bona fide and essential supervisory, distributive, selling, or soliciting function in the marketing of such products to the consumer.
7. Representing, directly or by implication, or by use of hypothetical examples or representations of past earnings of participants, that participants in any marketing or sales plan or program, will earn or receive, or have the reasonable expectancy of earning or receiving, any stated or gross or net amounts, unless, in fact, a majority of participants in the community or geographic area in which such representations are made, have achieved the stated or gross

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or net amounts represented, and the representations accurately reflect typical and average earnings of such participants from the marketing or sales plan or program, under circumstances similar to those under which the participant, or prospective participant, to whom the representations are made, plans to operate.

8. Misrepresenting in any manner, directly or by implication, or placing in the hands of others the means or instrumentalities for misrepresenting, the financial gains reasonably achievable by participants in any marketing or sales plan or program, or the commercial feasibility thereof.
9. Recruiting or accepting a prospective participant in any marketing or sales plan or program, without first disclosing to such prospect in writing the number of other participants in the community or geographic area in which such prospect plans to operate, and the typical and average earnings achieved by such other participants from the marketing or sales plan or program, under circumstances similar to those under which the prospective participant plans to operate.
10. Fixing, establishing, or maintaining, directly or indirectly, the prices at which any products may be resold by any dealer, distributor, or participant, and offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program, or entering into, maintaining, or promoting any con-

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tract, agreement, understanding, marketing system or course of conduct, which may have the effect of fixing, establishing or maintaining the prices at which any products may be resold, except that in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

11. Requiring any dealer, distributor, or participant to refrain from selling products which he has purchased to any specified person, class of persons, business, or class of businesses, and offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program, or entering into, maintaining, or promoting any contract, agreement, understanding, marketing system, or course of conduct, which may have the effect of causing any dealer, distributor, or participant to refrain from selling products which he has purchased to any specified person, class of persons, business, or class of businesses.
12. Publishing, providing, or distributing directly or indirectly, for a period of three (3) years after this order becomes final, any resale price list, or order form, report form, sales manual, or promotional or instructional material, which lists resale prices or sample resale prices, except that in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

IT IS FURTHER ORDERED that respondents deliver a copy of this Order to all present and future dealers, distributors,

Initial Decision

or participants in any marketing or sales plan or program, or who are engaged in the sale of respondents' products or services, and to secure from each a signed statement acknowledging receipt of this Order.

IT IS FURTHER ORDERED that the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change which may affect compliance obligations arising out of this Order.

IT IS FURTHER ORDERED that Carl G. Simonsen, the individual respondent named herein, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

DANIEL H. HANSCOM,
Administrative Law Judge.

October 11, 1973

Final Order and Opinion

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

Docket No. 8872

[SAME TITLE]

This matter having been heard by the Commission upon the appeal of respondents' counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having denied, in larger part, and granted, in lesser part, the appeal;

IT IS ORDERED that the following Findings of Fact, "Discussion," and Conclusions of Law of the Administrative Law Judge are adopted as Findings of Fact, "Discussion," and Conclusions of Law of the Commission:

"Preliminary Statement" (pp. 1-3); Findings of Fact 1-25 and 27-30; pp. 25-27 *sub nom.* "Discussion"; p. 35 (last two paragraphs); p. 37 (last paragraph) through p. 44; Conclusions 1-4.

Final Order and Opinion

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order be, and it hereby is, entered:

ORDER

IT IS ORDERED that respondent Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc., and officers thereof, and respondent Carl G. Simonsen, individually and as an officer of said corporation, or corporations, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of brassieres, girdles, lingerie, wigs, or of any other products, or of distributorships or franchises, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein a participant gives a valuable consideration in return for the opportunity to receive compensation for inducing other persons to become participants in the plan or program; *provided that* "compensation" as used in this paragraph only does not mean any payment based on actually consummated sales of goods or services to persons who are not participants in the plan or program, and who do not

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purchase goods or services in order to participate in the plan or program.

2. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants are, or are represented to be, based in any manner or to any degree upon their recruiting of other participants who obtain the right under the plan or program to recruit yet other participants, whose function during their first year in the plan or program includes, in any respect whatsoever, the recruitment of participants.
3. Operating any marketing or sales plan or program unless respondents agree to and notify participants that they will promptly repurchase all or any part of any initial order of merchandise made by any participant, upon written request of the participant mailed within 30 days (or a greater period of time if respondents elect) of the receipt of the initial order by the participant, at the price actually paid by the participant for the merchandise, provided, however, that respondents may insist that prior to making repurchase, the merchandise be returned to respondents' place of business, postage or shipping prepaid, in a resaleable condition, said merchandise to be shipped within 30 days (or a greater period of time if respondents elect) of the date on which written request for repurchase is received.
4. Representing, directly or by implication, or by use of hypothetical examples or representations of past

Final Order and Opinion

earnings of participants, that participants in any marketing or sales program will earn or receive, or have the reasonable expectancy of earning or receiving, any stated gross or net amounts, unless in fact, a majority of participants in the community or geographic area in which such representations are made, have achieved the stated gross or net amounts represented, and the representations accurately reflect the amount of time required by such participants to achieve such gross or net amounts.

5. Misrepresenting in any manner, directly or by implication, or placing in the hands of others the means or instrumentalities for misrepresenting, the financial gains reasonably achievable by participants in any marketing or sales plan or program, of the commercial feasibility thereof.
6. Failing to maintain adequate records (a) which disclose the facts upon which any claims of the type discussed in paragraphs 4 and 5 of this Order are based; and (b) from which the validity of any claim of the type discussed in paragraphs 4 and 5 of this Order can be determined.
7. Requiring that an individual pay a valuable consideration in return for the right to participate in any marketing or sales program, without first disclosing to such prospective participant in writing the number of other participants in the marketing area in which such prospect plans to operate.

Final Order and Opinion

8. Representing that the supply of available participants in respondents' marketing program is inexhaustible or virtually inexhaustible.
9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose or effect to require any individual to resell at any particular price a product which he or she has purchased, *provided that* in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.
10. Publishing or distributing, directly or indirectly, any resale price list, product price list, order form, report form, promotional material or any other document which employs resale prices for commodities sold by respondents without stating clearly and conspicuously in conjunction therewith the following:

The resale prices quoted herein are suggested prices only.

Provided that in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

11. Entering into, maintaining, or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose or effect to require any individual to refrain from reselling products which he or she has purchased, to any speci-

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fied person, class of persons, business, or class of businesses.

IT IS FURTHER ORDERED that respondents deliver a copy of this Order to all present and future dealers, distributors, or participants in any marketing or sales plan or program they operate, or who are engaged in the sale of respondents' products or services, and secure from each a signed statement acknowledging receipt of this Order.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change which may affect compliance obligations arising out of this Order.

IT IS FURTHER ORDERED that Carl G. Simonsen, the individual respondent named herein, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

IT IS FURTHER ORDERED that each of the respondents herein and their successors and assigns shall, within sixty (60) days after service upon them of this Order, file with the Commission a report, in writing, setting forth in detail the

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manner and form in which they have complied with all of the provisions of this Order.

By the Commission. Commissioner Nye not participating.

S E A L

VIRGINIA M. (illegible)
Acting Secretary

ISSUED: July 23, 1974

Opinion of the Commission

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

Docket No. 8872

{SAME TITLE}

By DIXON, *Commissioner*

The complaint in this matter was issued on November 24, 1971, charging respondents with unfair and deceptive acts and practices, and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (5 U.S.C. §45) in connection with the promotion and operation of their Symbra'ette marketing program. In particular, it was alleged that respondents' open-ended, multi-level marketing program was (1) in the nature of a lottery, and (2) that their use of it was unfair and deceptive. It was further alleged that respondents had made specific misrepresentations in the sale of their products to distributors. Additionally, the complaint charged vertical price-fixing and unlawful customer restrictions. Following hear-

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ings, the administrative law judge issued an initial decision dated October 11, 1973, finding respondents in violation of all counts of the complaint. Respondents have appealed.

Background

Corporate respondent manufactures brassieres, girdles, lingerie, swimwear and wigs, and engages in the advertising, sale, and distribution of these to the public through the Symbra'ette marketing program. Individual responder[†] Simonsen is president and director of Symbra'ette, its founder and creator of its distribution policies. He has been responsible for establishing, supervising, directing and controlling the business activities and practices of Symbra'ette. (I.D. 7)¹

¹ Initial Decision, Finding 7. This form of abbreviation will be used throughout. Other abbreviations used herein:

- Tr. — Transcript of Hearings
- CX — Complaint Counsel's Exhibit
- RX — Respondents' Exhibit
- RB — Respondents' Appeal Brief
- CB — Complaint Counsel's Answering Brief on Appeal

Respondents' counsel challenges various Findings of Fact by the administrative law judge relating to respondent Simonsen's role, alleging that "Carl G. Simonsen does not act as an individual with respect to the Symbra'ette marketing program, but only serves in the capacity of a corporate officer of Symbra'Ette, Inc." (RB 47) Whatever the significance of this distinction, it is evident from the uncontested findings of fact regarding Simonsen's role in the organization, that he exercised sufficient control and influence over the corporation and its challenged practices to require the imposition of an order on him individually co-extensive with that imposed on the corporate respondent in order to eliminate the illegal practices. (I.D. 2; CX 92, Stipulation 1) See *General Transmissions Corp.*, 73 FTC 399, 431-32 (1968), *aff'd*, 406 F.2d 227 (7th Cir.); *cert. denied*, 395 U.S. 936 (1969); *Fred Meyer, Inc.*, 63 FTC 1 (1966), *aff'd*, 359 F.2d 351, 368 (7th Cir.); *cert. denied, granted as to another issue*, 386 U.S. 907-08 (1967).

Opinion of the Commission

The facts concerning the organization of the Symbra'ette marketing plan are not basically in dispute. Respondents challenge occasional characterizations of these facts sprinkled by the administrative law judge throughout his Findings, but the principal details of the system were subject to stipulation at trial.

Respondents, through their multi-level marketing program, seek to enlist the services of men and women throughout the country to sell their products at wholesale and retail, requiring distributors to buy an inventory of varying size before they may participate in the program. A potential distributor (also called a "consultant") may enter at one of three levels, ("Key Distributor," "Senior Key," or "Supervisor"), and eventually work up to a fourth and fifth level (District Manager and Regional Manager). Entry into the program is effected by means of a non-refundable² purchase of merchandise from the company or one of its distributors. All distributors except the lowest, Keys, purchase directly from the company. A Key distributor purchases from his sponsor. Initial purchase requirements for entry into the program are stated in terms of "Retail Purchase Volume" (RPV), *i.e.*, the volume of merchandise expressed in terms of its suggested retail price. The initial purchase requirement for entry into the program is \$300 in RPV for a Key, which at the allowed discount of

² Subsequent to the institution of the Commission's complaint respondents modified their system to permit refunds if requested within a fixed period of time, and to limit the number of consultants allowed in any one state. The system described in this opinion is that existing at the time of the complaint.

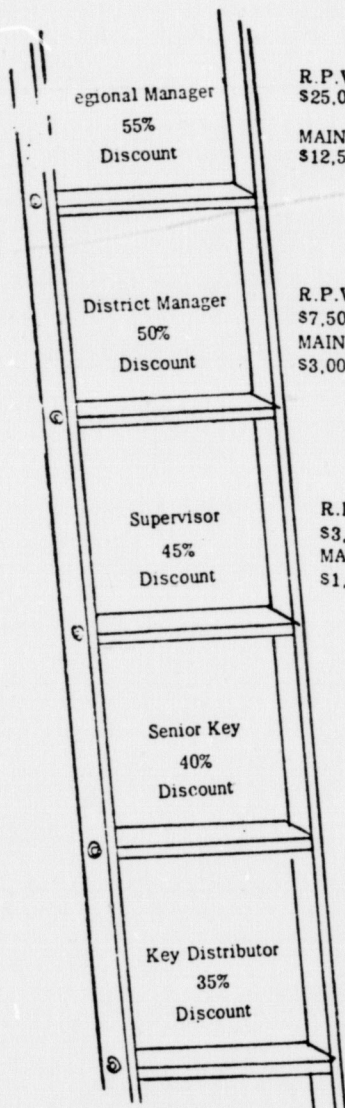
Opinion of the Commission

35% amounts to an initial purchase requirement of around \$215.³

The initial RPV required for a Senior Key is \$1,000, which at the allowed discount of 40%, and including literature and sales aids entails an initial purchase of around \$700. (I.D. 9) The initial purchase required of a Supervisor is around \$1,950, resulting from a \$3,000 RPV requirement at a 45% discount, plus sales aids. (I.D. 10)

³ This amount also included a charge for literature and sales aids. (I.D. 8) Respondents' counsel at oral argument stated that the initial investment at the lowest levels was around \$150. While the precise figure is immaterial, respondents' own promotional materials state the figure to be \$215 as cited by the law judge. (CX 75Z13)

Opinion of the Commission
THE SYMBRA'ETTE MARKETING PROGRAM



R.P.V.
\$25,000

 MAINTAIN
\$12,500 per month

Qualified Regional Managers earn 5% on District Managers; 10% on Supervisors; 15% on Senior Keys; 20% on Key Distributors; 3% on directly sponsored Regional Managers; 1% on indirectly sponsored Regional Managers; 1% on indirectly sponsored District Managers; \$200 cash car allowance.

R.P.V.
\$7,500
 MAINTAIN
\$3,000 per month

Qualified District Managers earn 5% on Supervisors; 10% on Senior Keys; 15% on Key Distributors; 3% on directly sponsored District Managers; 1% on indirectly sponsored District Managers; \$150 cash car allowance.

R.P.V.
\$3,000
 MAINTAIN
\$1,500 per month.

Qualified Supervisors earn 5% on Senior Keys; 10% on Key Distributors; 2% on directly sponsored Supervisors; \$100 cash car allowance.

R.P.V.
\$1000
 MAINTAIN
\$500 per month

Qualified Senior Keys earn 5% on Key Distributors.

R.P.V.
\$300
 MAINTAIN
\$100 per month.

Key Distributors purchase from their sponsor.

FEDERAL TRADE COMMISSION	
Docket No. <u>85-72</u>	COMMISSION RESPONSE Exhibit No. <u>740</u>

YOUR LADDER TO SUCCESS

The Symbra'ette Marketing Program is designed so that the ambitious person can start small or as large as he desires. Consultants can rapidly work into higher income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor.

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A Key distributor may engage in unlimited recruiting of other distributors, and advance to the level of Senior Key if the Key's retail purchase volume and that of the Key's recruits amount to \$1,000 in one calendar month. (I.D. 8) Similarly, Senior Keys and Supervisors may rise to higher levels by achieving the requisite Retail Purchase Volume, through a combination of their own retail sales, and those of their "personal group" (various recruits and recruits' recruits; see I.D. 9-10; CX 1).

A Key distributor's profit is the difference between the prices paid the Key's sponsor for products, and the prices at which the Key resells. The profit for consultants at higher levels in the program consists of the margin on the consultant's own retail sales, the margin on sales of merchandise at wholesale to Keys recruited directly by the consultant, and various commissions, overrides, and other compensation related to the purchase volume of directly and indirectly sponsored consultants. (I.D. 7; CX 1, 74)⁴

To induce individuals to become consultants, respondents distributed various promotional materials which recited the details of the marketing system, and illustrated how, both by building a large personal group of salespeople via re-

⁴ Profits of Regional and District Managers were derived in part from overrides on the purchase volumes of certain indirectly sponsored consultants. I.D. 7, p. 5, is thus slightly incomplete in stating only that profits were derived from compensation based on purchase volume of directly sponsored consultants. (CX 1, 74) It must be noted that since the purchase volume of any consultant above the "Key" level is based in part on the purchase volume of Keys recruited by the consultant (who buy from said consultant), the overrides on purchase volume of one's "direct" distributors may also be a function of the purchase volume of one or more levels of indirect recruits.

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recruitment, and by selling at retail, an individual could earn large sums of money, ranging in the illustrations up to \$56,400 per year for District Managers and \$90,600 yearly for Regional Managers. (I.D. 14-21) Of the Regional Manager position, respondents' promotional "flip chart" promised "ANYONE CAN ACHIEVE THIS LEVEL." (I.D. 20; CX 75R) And, as the administrative law judge concluded:

Advancement from Key Distributor, or other level at which a participant "bought-in" to the Symbra'ette program, up the ladder of the Symbra'ette "pyramidal" organization, and achievement of the earnings of such higher distributional level, was represented by respondents as a reasonable expectation, feasible and possible for each and every recruit (CX 1, 74-75, prior findings). (I.D. 21)⁵

Individuals were induced by these promotional materials and the prospect of earning large amounts of money via retailing and recruiting activities, to purchase the requisite volume of Symbra'ette products for the level at which they wished to enter.⁶

⁵ These representations were made in some cases directly by respondents to recruits, in other cases indirectly, via the provision by respondents of promotional materials and guidance to consultants who were encouraged to use them in securing new recruits, and so forth.

⁶ Respondents quarrel at various points in their brief with the administrative law judge's characterization of this process as "buying into" a distributorship or "investing in" a distributorship. (RB 17, 47) Respondents' position is that since participants paid at

*Opinion of the Commission**Counts II and III*

Count II of the complaint challenged the Symbra'ette Marketing Program as unfair and deceptive on the grounds that:

the realization of financial gains [for some participants] is often predicated upon the exploitation of others who have been induced to participate therein, and who have virtually no chance of receiving the kind of return on their investment implicit in said merchandising program.

Count III of the complaint alleged that respondents had made certain express or implied misrepresentations in the course of merchandising their program. The administrative law judge concluded that:

The Symbra'ette open-ended, multi-level (pyramidal) marketing program, presented deceptively as a legiti-

the same rate for their initial inventory or product as they did for reorders, there was nothing left over that could be considered "consideration" for the right to recruit. This contention is not well taken. The entire thrust of respondents' promotion was to induce people to join by offering them both the opportunity to retail, and the chance to build an organization via recruitment. Unless people totally ignored the promises of recruiting opportunities, they were clearly induced in some measure to make their initial purchase of inventory by the opportunity to own a "distributorship." While common sense and the Commission's own expertise alone are sufficient grounds to find that the initial inventory purchase was a payment both for inventory *and* the promised right to recruit, complaint counsel's one witness also testified to the fact that he was chiefly attracted by the recruiting aspect of the program as it was presented to him through the use of respondents' promotional materials. (I.D. 19; Tr. 53-56, 99)

Opinion of the Commission

mate business opportunity, was inherently unfair, exploitive, and oppressive. . . . The Symbre'ette program not only caused, or had the capacity to cause, participants to invest their money in the hope of realizing the income held out by respondents as available, when such realization was an impossibility for all recruits, but caused, or had the capacity to cause, them to recruit others, including friends, relatives, and acquaintances to invest money in a program inherently unfair and deceptive. (I.D. p. 35)

and later:

. . . The Symbra'ette program, as already stated, had the capacity to bilk gullible or uncritical members of the public out of substantial sums of money, and out of their time, energy and efforts. Respondents' suggestion that no one was injured, damaged or deceived is rejected. Beyond that, however, the Symbra'ette marketing plan unquestionably had the capacity and tendency to injure, damage or deceive, and that is sufficient. . . . (Citations omitted). (I.D. p. 37)

Much has been made in the briefs and arguments of counsel about the administrative law judge's purported holding that the Symbra'ette Marketing Plan was "inherently" or "*per se*" deceptive and unfair. A somewhat less provocative formulation of this position, set forth alternatively by the judge, is simply that the challenged program had the substantial tendency, capacity, and potential to mislead, a conclusion with which we entirely

Opinion of the Commission

agree, and one which compels prohibition of the offending practices. See *Sterling Drug Co. v. Federal Trade Commission*, 317 F.2d 669, 674 (2d Cir. 1963); *Goodman v. Federal Trade Commission*, 244 F.2d 584, 604 (9th Cir. 1957); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

In representing their plan, respondents held out to individuals the possibility of making large sums of money through a combination of retail selling of merchandise and recruitment of others, who would themselves engage in retail selling and still more recruitment, *ad infinitum*. Recruits were furnished with copies of Symbra'ette promotional materials, and encouraged to recruit others by making the same representations to them as had been made by the company, with the right to recruit and the promise of profits from recruiting and the efforts of one's recruits in this fashion being passed on without limitation or end.

It seems to us clear beyond peradventure that operation of such a plan creates the overwhelming likelihood of deception. It may transpire that those who enter the program initially (at the top of the pyramid) are not deceived, in that they are able to achieve the volume of recruitment, and their recruits are able to achieve the volume of sales, which are represented as being a reasonable possibility. Nonetheless, since the linchpin of the system is that those at the beginning will be able to succeed by promising others the ostensibly lucrative right to build their own network of recruits, and so on without end, there arises a substantial likelihood that at some point the representation that the plan affords a reasonable business opportunity will

Opinion of the Commission

be made to individuals to whom it will appear plausible, but for whom it will be blatantly untrue, by virtue of the fact that the universe of potential recruits (which is much, much smaller than the universe of potential consumers) has been effectively exhausted. The person who makes the sales pitch which actually deceives may well not be the perpetrator of the scheme, just as the originator of a chain letter may never correspond directly with those who become its eventual victims. But the deception and unfairness are not, thereby, any less the responsibility of the one who initiates the process. [Cf. *Twentieth Century Co. v. Quilling*, 139 Wisc. 318, 110 N.W. 173, 176 (1906)].

Respondents argue that there was no showing made at trial that any individuals were actually deceived by the Symbra'ette Plan in operation. They contend that the theoretical saturation portrayed by complaint counsel and the administrative law judge was never achieved, since respondents' distributors never totalled more than 3,635, and have declined from that high. The number of distributors acquired by respondents proves nothing one way or the other. It may be that respondents never attracted more distributors because the market for their distributors was in effect no larger than several thousands, and that as the number of distributors approached 4,000, distributors began to discover that contrary to the promises in the promotional materials, there was little or no money to be made by further recruitment or retail sales. That the number of respondents' distributors has diminished since institution of the complaint is also not inconsistent with the view that many came to discover that the Symbra'ette Plan was

Opinion of the Commission

not, as represented, a reasonable business opportunity for them.⁷

Respondents contend that far from causing deception, the system has merely reached a "stable equilibrium," in which *mirabile dictu* no one is deceived and everyone's expectations are vindicated. It is clear that if all, or even many participants entered the Symbra'ette Program with the expectation that they would earn profits by building their own sales organizations in the fashion represented by respondents, the point would soon be reached at which those expectations were disappointed. On the other hand, it is obviously possible to imagine, as a logical if not practical possibility, that an open-ended, multi-level plan of the sort involved here will develop a "stable equilibrium," in which, through no design of the initiators, no one is injured. In respondents' view, this has resulted here because some individuals enter with diminished expectations (borne in part of skeptical evaluation of the marketing plan), while others, though hoping to reap the rewards represented, subsequently conclude that they do not wish to exert the effort required, and so leave before discovering that their effort would not be repaid. The constant attrition of cer-

⁷ It is interesting to note that respondents' high number of distributors, 3,635, was achieved in 1972, in which same year, respondents' sales volume was \$1,195,465. (I.D. 4) Assuming that this entire volume represented product sold to consultants at the maximum allowable discount of 55% (reserved for Regional Managers only) then the total profit made by *all* distributors of respondent on that volume would have amounted to \$1,461,114.50 ($55/45 \times \$1,195,465$), assuming all inventory was resold at suggested resale prices. This amount is equivalent to barely in excess of \$400 *annual profit* for each of the distributors enrolled with respondents, a far cry from the amounts represented as realistic by respondents for even the lowliest Keys.

Opinion of the Commission

tain distributors and the diminished expectations of others, may make it possible for a smaller number of individuals who believe the representations and exert the requisite effort, to realize in fact the results implied by the presentation of the plan as a reasonable business opportunity for anyone.⁸

The mere possibility, however, that a potentially deceptive scheme, with substantial capacity to deceive and to injure, may in fact fail to injure, can be no defense of its institution. The appeal of the Symbra'ette Marketing System is at root the same as that of the chain letter and similar devices which courts and legislatures have recognized since time immemorial constitute a threat to the public welfare. The danger of open-ended, multi-level sales schemes, and their considerable potential deceptiveness, lies in the seeming universal feasibility of a money-making mechanism which is in fact not universally feasible at all. Any plan which holds out the opportunity to make money, by means of recruiting others, with that right to recruit being passed on as an inducement for those others to join, and being passable by them *ad infinitum* contains this intolerable potential to deceive, quite apart from whatever particular representations may be made in promoting the plan. Any plan involving such unlimited recruitment, with

⁸ Of course, it should be noted that those individuals who make this dream world "stable equilibrium" possible by leaving the program without exerting the requisite effort to succeed, have still been deceived, because they have been led erroneously to think that they could have succeeded with effort, although they eventually choose not to act on the deceitful premise. And they may also have lost their investment, though respondents would claim this was so because they did not exert the effort required to recoup it.

Opinion of the Commission

passing-on of the right to recruit *ad infinitum*, which extracts a valuable consideration from individuals in return for the opportunity to participate in it, threatens severe injury, since at some point the likelihood must arise that participants will be unable to recoup their investment of time and money by means of such recruitment. The Symbra'ette Marketing plan fits these criteria. To say that it is "inherently deceptive or injurious" is to say no more than this.

One can imagine, of course, some elaborate scheme of disclosures which could eliminate the potential deceptiveness of the scheme. If, through some feat of technology, every potential recruit might be apprised in appropriately apocalyptic terms that he or she might end up "holding the bag," the potential deception would be eliminated. But merely to state this theoretical possibility is to demonstrate its unreality. While respondents might be made to give all potential recruits with whom they dealt a detailed "prospectus" informing them of all the risks and current statistics, they could hardly assure that the same information would be passed on by all those in the chain of recruitment. Though we recognize that some elaborate system of disclosure might be devised to remedy the inherent deceptiveness of an open-ended, pyramidal marketing plan, it would surprise us to encounter such a system in the real world, and we do not regard its theoretical possibility as a significant qualification to the principle that marketing plans of the sort here involved run afoul of Section 5.

Respondents also argue that their program is to be distinguished from the traditional "chain letter" or "pyramid" scheme in that returns to distributors are ultimately de-

Opinion of the Commission

pendent on retail sales to consumers, whether by the distributors themselves or their various recruits. In the first place, this contention is not correct, since overrides and commissions in the marketing plan are based on the *purchase volume* of one's recruits. Because recruits must pay from \$215 to \$1,900 for initial inventories (\$300 to \$3,000 RPV) their recruiters do, in fact, receive some compensation based simply upon the fact of recruiting, whether or not any product is ever resold to consumers.

In addition, we do not believe that even when this aspect of the plan is eliminated (as it shortly will be) the potential for deception is also expunged. Respondents are still in the position of holding out to any and all who will purchase product from them, the realistic opportunity to recoup the investment by recruiting salespeople who themselves recruit, *ad infinitum*. Somewhere along the line it is certain that the plan will not prove to be a reasonable business opportunity for those to whom respondents indiscriminately allow it to be represented as such. We do not think that Section 5 requires that we wait until a plan with such patent capacity for deception blossoms into full-fledged fraud before we prohibit it.

Count III

The complaint further alleged that respondents had made several particular misrepresentations, those being that:

- (1) it is not difficult for participants to ascend to a higher level within the marketing chain so as to increase their chances of recouping their investments and of earning the represented profits;

Opinion of the Commission

- (2) all participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings; and
- (3) the marketing program is commercially feasible for all participants, and the supply of available entrants and investors is virtually inexhaustible.

The administrative law judge properly concluded that the challenged representations were conveyed by respondents' promotional literature. (I.D. 21, 14-16, 18-20) The Flip Chart (CX 75), which respondents recommended be utilized in all recruiting ventures, illustrated how, through continuous recruitment, anyone could rise from level to level in the Symbra'ette Plan, steadily earning higher levels of income, until the plateau of Regional Manager was attained. "Anyone Can Achieve This Level," assures the Flip Chart. Throughout, no indication is given that achievement of projected income levels might in any way depend on factors other than the individual's own willingness to achieve them.⁹

⁹ Respondents' reference to *Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252 (D.C. Cir. 1968) is incomplete. (RB 14-15) The court stated in *Rodale* that "[i]n view of the absence of absolute terms like 'all' or 'any' [italicized words deleted from respondents' characterization] and the presence of the qualifying language quoted above" the Commission could not read "all" or "any" into certain challenged representations (p. 1255). Respondents here, of course, did expressly represent that *anyone* could attain the highest level in their program, and they did not qualify this in any meaningful way. More importantly, the two cases are not really comparable. In *Rodale* the Commission read the term "all" or "any" into certain written representations such as "answers health problems." Here, the representation of "all" or "any" results from respondents' making the same glowing promises of reasonably possible success to all prospective recruits, without acknowledging that success cannot be reasonably possible even for all participants willing to put forth the requisite effort.

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Respondents argue that even if the challenged misrepresentations may be shown to have been made, there is no evidence of record to demonstrate their untruth. It is clear, however, from an analysis of respondents' marketing plan, that all participants in it could not possibly succeed according to the representations made, and that it could not operate for all, or even a large percentage of participants, in the manner portrayed in the promotional materials. This conclusion is not inconsistent with the conclusion that the Symbra'ette marketing plan, and specific representations made to promote it, were deceptive. Undoubtedly, many men and women of reasonable intelligence and analytic ability would be able to sit down and reason out the quicksand nature of respondents' scheme. Others, however, will be blinded by the seeming plausibility of the pyramid mechanism, and neglect the careful analysis that would dictate caution, while some may be unable to discover with any amount of care that the Flip Chart is a snare and a delusion. We are obliged to protect the latter no less than the former.

Order Provisions

The Commission has devoted considerable attention to the matter of appropriate order language with respect to the open-ended multi-level marketing program, and solicited the views of both parties in supplemental briefs subsequent to oral argument. We are mindful of the point raised by respondents, that operation of a legitimate, non-deceptive direct selling business organization may well require some element of recruiting by independent contrac-

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tors, at least where the organization lacks the capital to hire middle-level distributional personnel. At the same time, it is imperative to eliminate the abuses of recruitment found in this case—the deceptive lure of profits tied to continuous recruitment which inevitably gives rise to the illusion that success is available without constant concern for product sales to consumers. We have endeavored in drafting our order to prevent respondents from inducing individuals to distribute respondents' products on the basis of false premises, while leaving respondents flexibility to offer individuals a legitimate business opportunity in a nondeceptive manner.

Paragraphs 1 through 8 of the order relate to Counts II and III of the complaint. Paragraphs 4-8 prohibit various specific misrepresentations made by respondents (Count III). Misrepresentation of potential earnings is a particularly grave abuse and must be strictly curbed. We believe that paragraphs 4 and 5 (slightly amended from the administrative law judge's proposal) are suited to this purpose and, as amended, are not unreasonably vague. We have added paragraph 6 requiring respondents to maintain documentation to substantiate any earnings claims they may make. Although not contained in the notice order, this housekeeping provision is fully justified by the nature of the case. The Commission cannot effectively monitor compliance with a provision banning misrepresentations of earnings potential unless respondents are required to maintain the requisite substantiation.

Paragraph 7 is a softened version of the administrative law judge's proposed paragraph 9. Respondents object that the judge's paragraph is impossible to comply with. We

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agree it would present formidable difficulties, particularly with respect to the requirement of areawide earnings figures. This is precisely why, as noted earlier, disclosure requirements alone are insufficient to remedy the abuses of open-ended pyramidal distribution systems. We do believe that the record in this case fully justifies a requirement that respondents furnish prospective distributors some indication of the number of distributors already operating within a given marketing area, at least in those instances in which a distributor is asked to make an investment in inventory. A man or woman who is induced to pay hundreds of dollars for merchandise on the premise that there is a vast untapped market for the product (at wholesale or retail) surely has the right to know how many other people are trying to reach the same market with the very same brand product. Respondents may escape the bite of paragraph 8 by not requiring an initial investment on the part of their distributors. We believe this is a reasonable compromise between legitimate business interests and the necessity to prevent recurrence of past deceptions.

Paragraph 8 prohibits the representation that the supply of potential participants in respondents' program is virtually inexhaustible. Respondents would qualify this prohibition by the phrase "unless the number of active participants in the respondents' marketing program is less than 1/10 of 1% of the population of the state of the United States in which the representation is made." We specifically reject this approach. It is clear from the record that respondents have no idea whatsoever how many distributors of their product can survive in a given market area. There is no reason to think that a given market area can

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support even 1/50 of 1% of its residents as Symbra'ette distributors, let alone 1/10 of 1%, and respondents should not print promotional material which suggests that the supply of prospective recruits is virtually inexhaustible without some idea of what that means in terms of market realities.

Paragraph 3 is adapted from respondents' supplemental submission. It requires that respondents refund the purchase price of any initial inventory purchase by a distributor who so requests within 30 days. This corresponds to respondents' own amended post-complaint practice. The refund provision should help remedy any injury done to distributors who enter the program as a result of deception.

Paragraphs 1-2 respond to Count II of the complaint. It is clear that merely prohibiting particular misrepresentations, and requiring commercially feasible disclosures is insufficient to cure the deceptive potential of the marketing program. Some alteration of the program itself is necessary.

Paragraph 1 of the order prohibits respondents from operating a marketing program in which an individual *pays a valuable consideration* in return for the right to earn compensation for the mere act of recruiting other participants, *irrespective of such recruits' sales to consumers*. This paragraph is designed to ensure that any compensation received by a participant for recruiting activities will be based strictly on product sales of recruits, and not on the inventory purchases of recruits. Without such a prohibition, participants may be induced to purchase inventory from respondents with the promise that they may recoup

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their investment (at least in part) by inducing others to purchase inventory and by offering them the prospect of making back their investment in the same way. If respondents wish to operate a program in which participants must make initial purchases of inventory (or sales aids) whether they can sell or not, respondents may hire employees to locate such participants, or they may even pay commissions to non-employee representatives to find such participants. They may not, however, induce those representatives to buy inventory from them (or pay other consideration) in return for the right to recoup the investment in whole or in part by finding other inventory buyers.

Order paragraph 2 is addressed to the problem of unlimited recruitment. Even if so-called "headhunting" is eliminated (by paragraph 1) and a distributor's profits in the system are related solely to the *retail sales* of successive generations of recruits, the possibility of deception remains, because, as noted earlier, the individual may be induced to buy inventory on the mistaken assumption that he or she can delegate the retailing function to later generations of recruits, each of which may enlist for similar mistaken reasons.

We have modified paragraph 2 from the version proposed by the administrative law judge so as to allow establishment via participant recruitment of a three-tiered system of distribution, with compensation at the top level based (if desired) on performance of the lower two, provided, however, that those at the lowest level may not perform recruiting functions for a period of at least one year following their entry into any merchandising program. This should permit respondents reasonable flexibility in

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building a distributional network, while ensuring that the system must be presented to potential participants in a way which makes clear that their profits will depend directly on their own efforts in retailing to consumers or in building a retail organization. We recognize that upgrading within a legitimate business organization of participants at the lowest level is important; for that reason the third generation of recruits is allowed to engage in recruiting functions after one year. At the same time, it is necessary to create a substantial interruption in the chain of recruitment to avoid the inherently deceptive lure of the pyramid mechanism. We believe that paragraph 2 will prevent abuses of the recruitment lure, and achieve the requisite "fencing in," while leaving respondents appropriate latitude to develop a participant generated vertical distribution network in a nondeceptive manner.

Lottery

The Symbra'ette Marketing Plan was also attacked in the complaint (Count I) and condemned by the administrative law judge as being in the nature of a lottery, and therefore illegal. (I.D. pp. 27-37) The elements of a lottery are (1) prize; (2) consideration; and (3) chance. It is clear that respondents promised a "prize," large earnings, to be made in part via one's own retail sales, and in part via recruitment. It is also clear that a valuable consideration was extracted for the right to seek the recruiting prize, in the form of the substantial inventory purchase required for entry at various levels of the plan. (See n. 6 *supra*) Our difficulty in concluding that the plan is unlawfully in

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the nature of a lottery lies in evaluating the third element, chance.

Complaint counsel and the administrative law judge argue that the system must be condemned because "chance predominates." The initial understanding of a lottery embodied schemes in which attainment of the prize depended, in essence, almost *entirely* on chance, *e.g.*, pull tabs, punchboards, coupon drawings and the like. Subsequently courts applying anti-lottery laws have expanded the notion of "lottery" to embody schemes which are merely "permeated by chance" or in which "chance predominates." [Cf. *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160 (Wash., 1965)].

Decisions condemning so-called "referral selling" methods as lotteries have concentrated on the fact that one's rewards under such schemes would depend not only on one's own efforts in recruiting, but on the uncontrollable efforts of one's recruits and one's recruits' recruits, *ad infinitum*, a set-up deemed to appeal impermissibly (though obviously not exclusively) to the gambling instinct. *Zebelman v. United States*, 339 F.2d 484 (10th Cir. 1964). Some courts, confronted with *deceptive* modes of selling, but armed only with anti-lottery laws to attack them, have risen to the challenge though in less than jurisprudentially satisfying fashion by criticizing the schemes harshly for *disguising* the element of chance and the risks to participants, but then holding them illegal because of the mere presence of a measure of chance. [Cf. *State by Lefkowitz v. ITM, Inc.*, 275 N.Y.S. 2d 303].

The Federal Trade Commission Act, fortunately, does not require such indirection. It forbids outright acts and

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practices which are deceptive or potentially so, and for that reason condemns the Symbra'ette Marketing Plan, as noted hereinabove. We are left, then, with the somewhat academic question of whether or not the plan is also bad because it is in the nature of a lottery.

To be sure, success in the Symbra'ette Marketing Program involves a large element of chance. Those who enter with the expectation of earning large sums via recruitment are obviously at the mercy of their place in the chain, as well as at the mercy of members of the organization they might recruit. Success in the program may also involve a large element of skill, both at selling product and in recruiting and training a sales organization.¹⁰

We have difficulty distinguishing, however, in principled fashion between the concededly large element of chance involved here, and that inherent in numerous legitimate business endeavors. Consider, for instance, the real estate investor who happened to purchase a plot of swampland in 1900 in what is now called Miami Beach. Admittedly the investor may have shown shrewd judgment in evaluating the potential value of such land in the future. But the same investor also gambled very heavily on the actions of many individuals never met, and over whom the investor had no control, in undertaking development activities which led to appreciation in the investor's land. Is the sale of investment real estate thus an enterprise in which "chance predominates"? Is the sale of corporate stock an under-

¹⁰ We are aware as complaint counsel point out, that the system whose status as a lottery is being evaluated is only that part of the Symbra'ette plan involving recruiting. Even considering the recruiting aspect alone, however, it clearly involves both luck and skill.

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taking in which chance predominates? The lucky souls who years ago purchased shares of International Business Machines at a few dollars each (before numerous splits) may have shown good judgment in evaluating the future demand for computers, but to a very large extent as well they gambled on the ability of top management to build (or "recruit") and maintain an organization which could exploit that demand.

Underlying Section 5's prohibition of lotteries is the consideration deeply rooted in public policy that it is unfair for a private party to appeal solely to the consumer's gambling instincts for the purpose of selling products and making a profit. The long-standing rule that lotteries are *per se* illegal under Section 5, *per se* unfair acts and practices or methods of competition is thus adequate in dealing with schemes dependent entirely upon chance, appealing to little more than an individual's gambling instincts. But it is dangerous to extend mechanically the concept of lottery to encompass activities with elements of legitimate enterprise to them, without returning at the same time to the underlying issue: "Is it unfair or exploitive, leaving deception aside, to use a scheme involving this much chance to part man from money?" This question we find impossible to answer on the record before us, in part precisely because deception was not left aside, and indeed could not be. The evil of the Symbra'ette marketing system to which complaint counsel principally object is that it disguises the large element of risk involved. People are induced to pay money by the lure of a realistic business opportunity, and not by the lure of a roulette wheel. Given adequate disclosure of the risks involved (which as noted before we believe is probably impossible for schemes of this sort),

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would the remaining lure resemble more closely that of investment real estate or a crap game? We see no point in attempting an answer to this hypothetical question on the record before us.¹¹

Complaint counsel themselves appear to recognize the superfluity of those order provisions relating to lotteries, and in their supplemental comments on the order provisions in this case, requested by the Commission at oral argument, they have suggested those provisions be deleted. We believe that the abuses involved in the Symbra'ette Marketing system are adequately curbed by order language responding to Counts II and III of the complaint, and we shall therefore vacate those portions of the initial decision pertaining to the lottery count and delete similar portions of the proposed order.

Price Fixing and Customer Restrictions

Count IV of the complaint alleged vertical price-fixing, at the wholesale and retail levels, and Count V alleged that various customer restrictions had been imposed by respondents on their distributors.

With respect to the allegations of price fixing, the recitation in Finding 27 of the Initial Decision is sufficient to establish the violation. The consultant's contract signed by respondents' distributors specified that the distributor would sell Symbra'ette products in accordance with the

¹¹ It should be emphasized that our unresolved doubts concerning the "lotteryness" of plans of the sort involved here extend only to Section 5 of the Federal Trade Commission Act. The definition of "lottery" under state statutes often differs, and some state legislatures have expressly declared that certain pyramidal selling schemes are lotteries [e.g. *Fla. Stat. Ann.* §849.091 (Supp. 1972); *Tenn. Code Ann.* §39-2017 (Supp. 1971)].

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procedure set forth in the Sales Manual, and further specified that:

Violations of the aforementioned ethical standards and itemized rules or sound business practices shall be considered just cause for the termination of all contractual arrangements between Ger-Ro-Mar, Inc. and the violator. (CX 13, 14, 15-22)

The Sales Manual stated:

. . . you buy Symbra'ette products at wholesale prices—to be sold through personal sales direct to the public at suggested retail prices. . . . (CX 74P)

The effect of these provisions was to create an agreement to fix prices, and such an agreement is illegal *per se*.¹² Whether or not respondents ever sought to enforce their agreements is immaterial. The danger of contracts and agreements to fix prices, even if technically unenforceable, is that one of the parties will feel obligated to adhere to the contractual language. Here, especially, that danger was considerable, since the parties to these agreements were generally not established business people with legal counsel who might be expected to realize the illegality of vertical price-fixing. Although respondents did delete the offending price-fixing language from their distributor's manual subsequent to institution of the Commission's investigation (RX 1), such belated abandonment is no defense. [See *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523, 531 (5th Cir. 1963)]. We shall retain in essence

¹² *In the Matter of Chock Full O'Nuts Corp., Inc.*, Docket No. 8884, Slip Op. pp. 8-9 (October 2, 1973).

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the administrative law judge's proposed order (our Par. 9) on price-fixing, for the purpose of prohibiting any recurrence in the future of illegal practices shown to have existed in the past.

We shall, however, amend Paragraph 12 of the administrative law judge's Order, which would prohibit for three years the mention in any literature, order forms, and the like sent to distributors, of "suggested retail prices," except in Fair Trade States. This remedy has been applied in some vertical price-fixing cases, but by no means all. Its purpose has been to eliminate the residual effects of a long past history of coercive price-fixing, the reason being that in such cases it would be insufficient merely to prohibit overt coercion but permit continuation of the use of suggested price lists with a coercive connotation. It is, of course, under normal circumstances, legal for a manufacturer to *suggest* a resale price to a distributor. Where, as here, the distributors are constantly changing and frequently have little or no business experience, there may even be a positive value in permitting dissemination of suggested price information, provided it is clear that advice given is merely a suggestion.¹³

Here, we find that the objectionable practices have indeed been abandoned, albeit belatedly, and while an order is

¹³ Those cases in which resale price lists were prohibited for a period of years have generally involved dealers in established relationships with a distributor. An unusual remedy was required to disturb long-established patterns of behavior, and, on the other hand, the positive value of price advice for the dealer was considerably less. See *Adolph Coors Co.*, Docket No. 8845 (July 24, 1973), *aff'd* No. 73-1567 (10th Cir. 1974); *Lenox, Inc.*, 73 FTC 578 (1968), *aff'd* 417 F.2d 126 (2d Cir. 1969).

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clearly required to prevent any recurrence, we do not believe that the further relief of a temporary prohibition on the mention of suggested retail prices, clearly denominated as such, is necessary.

In an effort to strike a balance between the competing considerations involved, we shall amend Paragraph 12 of the law judge's Order to permit the mention of suggested resale prices provided it is noted on any form or list where such occur that they are merely suggestions and not obligatory. (Par. 10 of Final Order)

Customer Restrictions

The allegations of Count V of the complaint deal in essence with customer restrictions. We find no reason to disturb Findings 28, 29 and 30 of the Initial Decision, which indicate that respondents did contract with their distributors so as to limit the parties to whom the distributors could resell their products. The restrictions included (1) prohibition of sale by one distributor to a retail customer of another; (2) prohibition of sale by one distributor to a sub-distributor of another; (3) prohibition of sale by one distributor to retail outlets, except for "exclusive boutiques" doing custom-fitting and not selling a competitive line of products.

Respondents contend that they never enforced the above illegal contractual requirements, and that they no longer include such requirements in their contract package. These contentions cannot constitute a defense for the same reasons noted in the discussion of price-fixing, *supra*.

Respondents also argue in the alternative that the restrictions were not shown to be anticompetitive. It is well established, however, that a manufacturer may not restrict

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the class of customers to whom his independent distributor may resell goods purchased from the manufacturer. See *Arnold, Schwinn & Co. v. United States*, 388 U.S. 365, 382 (1967). Such customer restrictions are illegal *per se*. The only clearly-established exception to this rule pertains to restrictions imposed for reasons of safety, which are not operative here. [*E.g. Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970), *cert. denied*, 400 U.S. 831 (1970).]

We shall, therefore, retain the administrative law judge's proposed order with respect to resale restrictions, although we have slightly reworded it. (Par. 11)

Miscellaneous Allegations

Respondents allege that the Commission in proceeding against them has acted arbitrarily. They cite a stipulation entered into with complaint counsel which says that there are "competitors of Symbra'ette selling brassieres, girdles, swimwear and lingerie under similar marketing and sales programs." [CX 92(7)] As of the date of the stipulation the Commission had instituted no formal proceedings against any of these competitors on the issues raised by the complaint in this matter.

Respondents recognize that a Commission proceeding to remedy violations of law is not invalidated merely because simultaneous action is not taken against others engaging in the same or similar practices. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958). While it is certainly true, as respondents argue citing the *Universal-Rundle* case,¹⁴ that the Commission does not have "unbridled power to institute proceedings which will arbi-

¹⁴ *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

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trarily destroy one of many law violators in an industry," it is absurd to contend that this will in any way be the result here. Nothing in the order entered in this matter will prohibit respondents from continuing to sell their products at retail, or from continuing to recruit sales personnel to sell such products. We doubt that respondents mean to contend seriously that only by means of continued deception is it possible for them to induce others to distribute their product for them and to compete in their line of business.

Moreover, while the Commission is not bound to proceed simultaneously against all perpetrators of an identical violation, it should be noted that the Commission has instituted numerous cases challenging the use of open-ended, multi-level distribution systems [e.g., *Holiday Magic, Inc.*, Docket No. 8834; *Koscot Interplanetary, Inc.*, Docket No. 8888; *Bestline Products Corp.*, Docket No. C-1986 (1971); *International Safe-T-Trac, Inc.*, Docket No. C-1826 and C-1827 (1970); *Devour Chemical Corp.*, Docket No. C-2294 (1972)]. As regards direct competitors of respondents, the exhibits cited by them to amplify the stipulation and to support their contention that the Commission has acted arbitrarily (RB 9; RX 138-145, 201, 202), reveal nothing to suggest that any of respondents' direct competitors allegedly engaging in the same practices has engaged in them on the same scale or for as long as respondents. Indeed, certain of these competitors appear to be fledgling imitators of respondents. (RX 138) The Commission will, as always, welcome any further information which respondents can provide regarding the allegedly unlawful acts and practices of their competitors, including evidence of their magnitude and duration, which might enable the Com-

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mission to determine whether further action is necessary or appropriate. That there has been any abuse of discretion in the institution of the present proceedings, however, is a contention for which there is utterly no support in the record, and which must be rejected.

We similarly reject respondents' contention that this proceeding is not in the public interest (RB 5-8). The determination that pursuit of this matter is in the public interest was duly made by the Commission at the time the complaint was issued, as prescribed by statute, and the claim that the matter lacks public interest is not one which may be interposed now as a defense to allegations of law violation. In any event, the evidence reveals that respondents' practices have the potential and capacity to deceive, and thereby they possess the capacity and potential to cause the loss of not inconsiderable sums of money by individuals who may rely on them to their detriment. It is no less in the public interest to eliminate and prevent the recurrence of such practices now than it was when the complaint was issued. While corporate respondent is not a giant of American industry, its sales volume is by no means inconsequential. The order issued in this case will not deprive aspiring citizens of legitimate opportunities to sell brassieres, girdles, lingerie, swimwear, or wigs. It will merely require that respondents undertake to attract distributors of their products in a manner that is not likely to deceive.

For the foregoing reasons, and to the extent indicated herein, the Initial Decision is adopted, and except as indicated herein, respondents' appeal is denied. An appropriate order is appended.

July 23, 1974

**Respondents' Petition for Reconsideration Under
Rule §3.55, Part 3 of the Rules of Practice**

ROSENBERG AND WISEMAN

JACK M. WISEMAN

MILTON D. ROSENBERG

2084 Alameda Way

San Jose, California 95126

Attorneys for Respondents

UNITED STATES OF AMERICA

BEFORE THE
FEDERAL TRADE COMMISSION

Docket No. 8872

[SAME TITLE]

To: *Honorable Commissioners of the Federal
Trade Commission:*

Lewis A. Engman, Chairman

Paul Rand Dixon

Mayo J. Thompson

M. Elizabeth Hanford

Stephen Nye

I.

Grounds For Petition For Reconsideration

Respondents, Symbra'Ette, Inc. and Carl G. Simonsen, hereby petition for reconsideration of the decision and final order entered in this action on July 23, 1974. Service

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of the aforesaid decision and final order was made on August 21, 1974. The petition for reconsideration of the decision and final order is based on the following grounds:

1. Respondents have urged that the decision of the Commission is in contravention of the holdings of the cases, *FTC v. Universal-Rundle Corp.* (1967) 387 US 244 and *Marco Sales Co. v. FTC* (2nd Circuit 1971) 353 F.2d 1 in that the Commission does not have the unbridled power to arbitrarily destroy one of many alleged law violators in an industry. It appears that the Commission concedes that respondents correctly state the law. However, the Commission seeks to distinguish its decision and Final Order on new questions raised for the first time by the decision and final order. Moreover, the petitioners have not had any opportunity to argue these new questions before the Commission, to-wit:

A. Whether the respondent corporation's direct competitors who have been engaged in the same or similar marketing plan for the sale of the same or similar products have been so engaged on the same scale or as long as the respondent corporation?

B. Whether certain of these competitors are fledgling imitators of respondent corporation's marketing plan?

C. Whether under the Federal Trade Commission Act, or any other appropriate enactment of law, a private corporation, such as the respondent corporation, is the appropriate or duly constituted agency for investigating allegedly unlawful acts and practices of other companies, such as the direct competitors thereof, in behalf of the Federal Trade Commission, to enable the Commission to determine

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whether action against such direct competitors is necessary or appropriate?

D. Does the Commission contend that a marketing plan with allegedly "patent capacity for deception"; which allegedly is "inherently unfair, exploitive and oppressive"; and which allegedly has the "capacity to bilk gullible or uncritical members of the public out of substantial sums of money and out of their time, energy and efforts" is lawful as to those companies in which the magnitude and duration thereof are allegedly less than scale and duration of the respondent corporation?

E. Whether Provisions 1 and 2 of the Final Order grant competitive advantages to direct competitors of the respondent corporation selling the same or similar products as are sold by the respondent corporation and employing the same or similar marketing plan as does the respondent corporation (except for said Provisions 1 and 2) to the extent that the respondent corporation will suffer irreparable harm and injury to its ability to continue in business to compete with such direct competitors?

F. Does the conduct of the Commission in ordering the respondents to obey Provisions 1 and 2 of the Final Order and permitting the direct competitors of the respondents (as defined in Paragraph II E above) to carry on their marketing plans without such restrictions constitute arbitrary and capricious acts prohibited by law?

G. Whether "it is absurd to contend" that the Final Order will arbitrarily destroy the respondent corporation while permitting the direct competitors of the respondents (as defined in Paragraph II E above) to grab up its bras-

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siers, girdle, swim wear and lingerie business, since the direct competitors will have the competitive advantage of not being restricted by Provisions 1 and 2 of the Final Order?

H. Is there substantial evidence of record to support the conclusion by the Commission that there is utterly no support in the record that the present proceeding has not been an abuse of discretion on the part of the Commission?

2. Provision 1 was first introduced in this proceeding by the Final Order. Respondents have not had an opportunity to argue Provision 1 before the Commission and discuss the propriety thereof.

3. Provision 2 was first introduced in this proceeding by the Final Order. Respondents have not had an opportunity to argue Provision 2 before the Commission and discuss the propriety thereof.

4. Provision 7 of the Final Order introduces for the first time the requirement for a disclosure of the number of participants in the "marketing area". The Initial Order referred to "community or geographic area". The term "marketing area" is indefinite and vague. It has not been defined by either the decision or the Final Order. Respondents have no objection to making a disclosure in writing of participants in a community or geographical area. The terms "community or geographical area" would provide uniformity with respect to Provision 4 of the Final Order. The propriety of Provision 7 of the Final Order as modified has not been argued before the Commission.

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5. The Initial Decision on page 37 reads as follows:

Beyond that, however, the Symbra'Ette marketing plan unquestionably had the capacity and tendency to injure, damage or deceive and that is sufficient.

The Decision by the Commission on page 8 reads as follows:

A somewhat less provocative formulation of this position, set forth alternatively by the judge, is simply that the challenged program had the *substantial* tendency, capacity, and potential to mislead, a conclusion with which we entirely agree, and one which compels prohibition of the offending practices. (*italics added for emphasis*)

The Commission had introduced in this proceeding by its decision the question of *substantial* tendency, capacity and potential to mislead. Respondents have not been able to argue before the Commission the question as to whether its marketing plan has a *substantial* tendency, capacity and potential to mislead or whether there is any substantial evidence of record to support a finding of substantial tendency, capacity and potential to mislead.

II.

Relief Desired

1. This proceeding be remanded to the Administrative Law Judge for further hearings to perfect the record for purposes of appeal on the following questions of fact:

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A. Whether respondent corporation's direct competitors (as defined in Paragraph 11E above) have been engaged in the same or similar marketing plan on the same scale or as long as the respondents?

B. Whether certain or respondent corporation's direct competitors (as defined in Paragraph 11E above) are fledgling imitators of the respondent corporation?

C. Whether Provisions 1 and 2 of the Final Order places the respondent corporation at a competitive disadvantage with its direct competitors (as defined in Paragraph 11E above) so as to cause the respondent corporation irreparable harm and injury in its ability to continue in business in competition with its direct competitors (as defined in Paragraph 11E above)?

D. Whether Provisions 1 and 2 of the Final Order for all practical purposes destroy the ability of the respondent corporation to compete with direct competitors (as defined in Paragraph 11E above)?

2. The Commission reconsider its decision with respect to the following legal conclusions:

A. Under the Federal Trade Commission Act, the respondent corporation is the appropriate agency to investigate allegedly unlawful acts and practices of other companies, such as the direct competitors of the respondent corporation, to enable the Commission to determine whether action against such direct competitors is necessary and appropriate.

B. A marketing plan with allegedly patent capacity for deception, with an allegedly inherently unfair, exploitive

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and oppressive capacity and with the alleged capacity to bilk gullible or uncritical members of the public out of substantial sums of money and out of their time, energy and efforts is lawful when carried out by organizations having a magnitude and duration less than the scale and duration of the respondent corporation.

C. The Commission in ordering the respondents to cease and desist from operating its marketing plan unless it is in conformance with Provisions 1 and 2 of the Final Order and permitting the respondent corporation's direct competitors (as defined in Paragraph IIE above) to continue to operate under the same or similar marketing without the restrictions of Provisions 1 and 2 of the Final Order does not constitute arbitrary and capricious conduct prohibited by law.

D. There is substantial evidence of record to support the conclusion by the Commission that there is utterly no support in the record that the present proceeding has not been an abuse of discretion on the part of the Commission.

E. There is substantial evidence of record to support the conclusion by the Commission that it is absurd to contend that the Final Order will arbitrarily destroy the respondent corporation.

F. There is substantial evidence of record to support the conclusion that the respondent corporation's marketing plan had the substantial tendency, capacity and potential to mislead.

3. Review of Provision 1 of the Final Order as to its need and appropriateness.

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4. Review of Provision 2 of the Final Order as to its need and appropriateness.
5. Modification of Provision 7 of the Final Order changing "marketing area" to "community or geographical area".
6. Stay of compliance of the Final Order until 60 days after the Commission has served on the respondents a Final Order and decision based on the Petition For Reconsideration without prejudice to the right of respondents to stay of compliance of order by virtue of any appeal taken to the Court of Appeals or any other reviewing court.
7. Stay of compliance of the Final Order until the respondent corporation's direct competitors (as defined in Paragraph IIE above) are ordered to comply with provisions similar to Provisions 1 and 2 of the Final Order by the Federal Trade Commission.
8. Dismissal of the Complaint.

III.

Law And Arguments

1. In the decision by the Commission, the Commission conceded that it does not have the unbridled power to institute proceedings which will arbitrarily destroy one of many violators in industry. The question posed for consideration is what effect, if any, will compliance with Provisions 1 and 2 of the Final Order have on the respondent corporation

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when its direct competitors sell the same or similar products under a same or similar marketing plan but without the requirement of compliance with Provisions 1 and 2 of the Final Order. It is submitted that this proceeding should be remanded to the Administrative Law Judge for hearing on these questions so that the record can be perfected for purposes of appeal and also for purposes of further adjudication by the Commission.

The Commission, without the benefit of evidence or testimony on this issue, was able to conclude "... it is absurd to contend that this will in any way be the result here." Yet, the Commission by its own comments in its decision on pages 16 and 17 acknowledges that the restrictions imposed by Provisions 1 and 2 could result in the respondent corporation being less competitive with respect to its direct competitors. The Commission on page 16 stated that Provision 1 of the Final Order is designed to ensure that any compensation received by a participant for recruiting activities will be based strictly on product sales of recruits and not on the inventory purchases of recruits. Common sense will dictate that a direct competitor capable of paying commissions on sales to other participants as distinguished from only sales to ultimate consumers will quickly be joined by respondent corporation's distributors.

Provision 2 of the Final Order precludes a distributor for the respondent corporation from recruiting for one year. Obviously, the ability of a direct competitor to offer a new participant the opportunity of recruiting forthwith and without delay will preclude the respondent corporation from obtaining new participants under its marketing plan. The net result must be to make the respondent corporation

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less competitive than its direct competitors and, of course, ultimately destroy the respondent corporation.

The Commission states in its decision that it proceeded against Holiday Magic, Koscot Interplanetary, Bestline Products, International Safe-T-Trac and Devour Chemical Corp. These companies do not compete with the respondent corporation.

The respondent corporation is concerned with the companies selling brassieres, girdles and the like under a marketing program in substance the same as the respondent corporation. Respondent corporation is concerned with Figurette (RX-145), Command Performance (RX-144), TLC (RX-117-199 and 142), Con-Stan Industries (RX-141), Penny-Rich, Cameo Coutures Company, Bravo Corporation and others. As set forth in Paragraph 10 of the Stipulation of Facts:

These are competitors of Symbra'Ette selling brassieres, girdles, swimwear and lingerie under similar marketing and sales programs. . . .

The Commission seeks to impose upon the respondents the duty of conducting investigations in behalf of the Commission. There are exhibits of record delineating the marketing plans of the direct competitors. The Commission should not be satisfied with the self-serving justification, which admits to its failure of fulfilling its investigatory responsibilities, to-wit:

The Commission will, as always, welcome any further information which respondents can provide regarding the allegedly unlawful acts and practices of their com-

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petitors, including evidence of their magnitude and duration which might enable the Commission to determine whether further action is necessary or appropriate.

In further justifying its failure to pursue the direct competitors of the respondents, the Commission draws the distinction that the direct competitors have been in business for a lesser period of time and at a lesser scale than the respondents. Respondents do not share the accuracy of these observations. Certainly, they are not based on any substantial evidence of record. Notwithstanding, respondents find it difficult to believe that the Commission seriously contends that a marketing plan with allegedly "patent capacity for deception"; which allegedly is "inherently unfair, exploitive and oppressive; and which allegedly has the "capacity to bilk gullible or uncritical members of the public out of substantial sums of money and out of their time, energy and efforts" is unlawful as to those companies in which the magnitude and duration thereof are allegedly less than the scale and duration of the respondent corporation, and such companies may continue to carry on such an alleged marketing plan without restriction and with complete impunity. Firstly, this proceeding should be remanded to the Administrative Law Judge for hearing on the new questions of fact. Secondly, it is submitted that such distinctions are not meaningful in light of the above comments when viewed with respect to the purpose of the Federal Trade Commission Act.

The leading cases as to whether the Federal Trade Commission can conduct itself in an arbitrary and capricious

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manner does not support the decision by the Commission in this proceeding. In the case, *Marco Sales Company v. FTC* (1971 CA2) 453 F.2d 1, the Court not only held that the law does not permit an agency to grant to one person that right to do that which it denies to another similarly situated, but also held that the distinctions articulated by the Commission to justify different treatments must be meaningful in the sense that trade regulatory significance is advanced by such distinctions. If the Commission's allegations are correct with respect to open-ended, multi-level marketing programs being abusive and unconscionable, a view not shared by the respondents, then it must follow that the magnitude and duration of such marketing plans do not abate the alleged wrongful conduct. It is submitted that to rely on such distinctions as magnitude and duration would constitute a patently arbitrary and capricious conduct on the part of the Commission. It is important to bear in mind that the Commission by its decision has not condemned only the marketing program of the respondent corporation, but all open-ended, multi-level marketing plans. The U.S. Supreme Court case, *FTC v. Universal-Rundle Corporation* (1967) 387 US 245, in effect, supports the above contention. See also *Audivox v. F.T.C.* (CA1 1960) 275 F.2d 685; *Sirbo Holdings, Inc. v. C.I.R.* (1973 CA2) 476 F.2nd 981 at page 987.

Mr. Chief Justice Warren, speaking for the U.S. Supreme Court in *FTC v. Universal-Rundle Corporation* (1967) 387 US 245, made it clear that the Federal Trade Commission does not have the unbridled power to institute proceedings which will arbitrarily destroy one of many alleged law violators in an industry. Thus, it would appear

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incumbent upon the Commission to remand this proceeding to the Administrative Law Judge for further hearings on the question as to whether the respondent corporation will be destroyed to perfect the record for appeal in view of the fact that Provisions 1 and 2 of the Final Order were first introduced in this proceeding by the Final Order.

Lastly, the Commission's statement on page 28 of the decision "That there has been any abuse of discretion in the institution of the present proceedings, however, is a contention for which there is utterly no support in the record, and which must be rejected" can best be answered in an article entitled, "The New FTC: Its Role in the 1970's" by Chairman Lewis A. Engman of the Federal Trade Commission which noted that case-by-case adjudication necessarily singles out individual parties and thus, such individual parties necessarily bear the brunt of government actions in employing a case-by-case adjudication for rule making. There has never been a prior adjudication by the Commission holding a marketing plan of the type employed by the respondent corporation unlawful. The net effect of the procedure being followed by the Commission is that the respondents are the scapegoats for the Commission's desire to exercise its rule making powers by means of a case-by-case adjudication procedure.

2. Reconsideration of Provisions 1 and 2 of the Final Order is respectfully requested. Provision 2 of the Final Order creates the problem of discrimination among third tier participants. In addition, it arbitrarily establishes one year as distinguished from one month in which a third tier participant may recruit others. Thus, Provision 2 of the

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Final Order arbitrarily discriminates between those third tier who have been participants for at least one year and those third tier participants who have been participants for less than one year.

The impact of Provision 2 of the Final Order should be considered from the point of view of the third tier participant. After all, it is the purpose of the present proceeding to protect the third tier participant. It would appear that in the mind of the newly recruited third tier participant is the pressing observation of discrimination among third tier participants. Specifically, the new third tier participant suffers the consequence of having to wait one year before the complete benefit of a marketing program can be enjoyed.

The issue submitted is whether Provision 2 of the Final Order is required or necessary. The Commission in its decision stated paragraph 2 is addressed to the problem of unlimited recruitment. There is no substantial evidence of record to support a finding of a problem of unlimited recruitment on the part of the respondent corporation. The actual facts are that after ten years of doing business under its marketing program, the respondent corporation never had more than 4000 participants at any given time. The Commission has relied on a theoretical analysis of a saturation theory to buttress its decision, which is speculative evidence and is not substantial evidence. Inferences drawn from speculative evidence must give way to the actual facts of record of probative value. Notwithstanding the expertise of the Commission, its findings must be drawn from substantial evidence of record. (*Gilb v. Federal Trade Commission* (CA2 1944) 144 F.2d 580)

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The Commission in its decision states the possibility of deception remains, because the participant may be induced to buy inventory on the mistaken assumption that the retailing functions can be delegated to a later generation of recruits. The seeking of lower tier distribution is a conventional and acceptable mercantile practice. Therefore, it appears that the premise of the above statement in the decision lies in the alleged element of chance in a lottery. Yet, the decision of the Commission clearly rejected the lottery concept and particularly the element of chance thereof. Perhaps, the premise of the above statement in the decision lies in the alleged deceptive practice allegedly resulting from inventory loading. It was intended by the Commission that Provision 1 of the Final Order abate the inventory loading by permitting the payment of compensation to a participant only after a sale has consummated with the ultimate consumer.

In the case, *FTC v. Milling Co.* (1933) 288 US 212, the Supreme Court held that an order should go no further than is reasonably necessary to correct the alleged wrong and preserve the rights of the public. When measures employed achieve the results desired by the Commission, there is no need to employ more drastic means.

In view of the foregoing, it is submitted that Provision 2 of the Final Order is not required and is not necessary.

3. The Commission introduced in this proceeding by its decision the question whether there is substantial evidence of record to support the finding that the respondent corporation's marketing plan had a substantial tendency, capacity and potential to mislead.

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Firstly, there is no evidence of record that any participant had been misled or injured. The Commission's only witness testified that he initially purchased Symbra'Ette merchandise for \$700 and that during the first year his wife's profit on the sale of Symbra'Ette goods sold to ultimate consumers was about \$1500. (Tr. page 76, lines 19-21; Tr. page 73, lines 1-4) Respondents' witness testified he had purchased Symbra'Ette products with an initial order of \$500. Retail sales to ultimate consumers by his wife ranged from \$6,000 to \$12,000 annually. (Tr. page 134, lines 17-23; Tr. page 135, lines 7-24). Exhibits RX-94 through RX-115 are typical earnings statements of Symbra'Ette distributors. From the evidence of record, there is no substantial evidence of participants being misled or injured.

The Commission has relied on the speculative evidence of a theoretical saturation theory to show that the respondent corporation's marketing plan has a substantial tendency to mislead, because the Commission conjectures that eventually the opportunity to find participants will be exhausted. On the other hand, the respondents made of record evidence of the fact that after ten years of operation, the peak number of Symbra'Ette distributors throughout the United States was 3,635. (RX-14 through RX-71). Over this period of time, the number of distributors varied. From December 4, 1967 to March 12, 1972, the number of active Symbra'Ette distributors varied from 633 and 3,635. Between May 22, 1969 and June 12, 1969, the number of Symbra'Ette distributors varied from 2,323 to 1,343. (RX-14 through RX-71).

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The issue presented is what constitutes substantial evidence to support a finding that the respondent corporation's marketing plan has a substantial tendency and capacity to mislead, since the Commission conjectures that eventually the opportunity to find participants will be exhausted. Respondents submit that substantial evidence must be founded on actual facts of record of probative value rather than speculative evidence of a theoretical analysis of a saturation theory which is too remote to be of probative value. The remoteness of the saturation theory is manifest when viewed in light of the actual facts of record.

In the case of *J. B. Lippincott Co. v. FTC* (CA3 1943), the court held that substantial evidence with which findings of the Federal Trade Commission must be supported, is evidence that affords a substantial basis from which the fact in issue must be reasonably inferred and is more than a scintilla and must do more than create a suspicion of existence of fact to be established.

Circuit Judge Swan, speaking for the Court of Appeals of the Second Circuit (1944) in the case, *Gill v. Federal Trade Commission* 144 F.2d 580, held that testimony as to a chemical analysis conducted without experience in the use of a preparation and contrary to testimony relating to actual experiences in the use of the preparation was not regarded as substantial evidence to support a finding by the Commission contrary to the actual experiences.

The want of substantial evidence of record to support the finding that the respondent corporation's marketing plan had a substantial capacity, tendency and potential to mislead warrants the removal of Provisions 1 and 2 from the Final Order.

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4. In conclusion, it is respectfully requested that the Final Order be revised omitting Provisions 1 and 2 thereof. Alternatively, the Final Order should be stayed until the respondent corporation's competitors (as defined in Paragraph II E above) are ordered to comply with Provisions 1 and 2 of the Final Order by the Federal Trade Commission. Additionally, the present proceeding should be remanded to the Administrative Law Judge for hearing on the questions of fact introduced by the decision and Final Order to perfect the record for purposes of appeal and for further consideration by the Commission.

Dated: September 5, 1974.

Respectfully submitted,

ROSENBERG AND WISEMAN

By JACK M. WISEMAN
Jack M. Wiseman

Attorneys for Respondents

**Order Denying Respondents' Motion
for Reconsideration**

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

[SAME TITLE]

On July 23, 1974, the Commission issued its Decision and Order in this matter, sustaining Counts II, III, IV, and V of the complaint, and vacating Count I. Respondents were served with the Decision and Order on August 21, 1974, and they have timely filed for reconsideration and certain other relief pursuant to Section 3.55 of the Commission's Rules of Practice.¹ Complaint counsel have answered opposing the motion.

The Commission has considered the arguments raised by respondents and finds that they do not warrant modi-

¹ This provides in pertinent part:

"Within twenty (20) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

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fication of its order, or a remand of this case to the administrative law judge, or a stay of its order, and respondents' requests will be denied.

Respondents basically seek reconsideration of certain order provisions entered by the Commission, and reconsideration of the Commission's conclusions concerning respondents' argument made at trial and on appeal that they should in some fashion be relieved of liability for their law violations because certain of their competitors may be engaged in the same or similar practices.

With respect to the order in this matter, the Commission in its deliberations on appeal devoted considerable attention to the matter of appropriate relief, and solicited supplemental briefs from both sides on the question, and we find no grounds stated in the motion to reconsider to warrant further modification of the order, or further hearings as to its propriety. See *Interstate Builders, Inc.*, 72 FTC 1009, 10 (1967). The Commission's order is similar in some respects to that proposed by the administrative law judge, but the Commission has added certain provisions, omitted others, and significantly modified some, as is its duty when, in reviewing the administrative law judge's recommendation, it concludes that a different disposition is appropriate. Paragraph 1, to which respondents object, was added by the Commission. It is fully justified by the facts of this case, and the abuse sought to be remedied, and respondents have not suggested in any way why it is not reasonably related to the findings in this matter or the scope of the complaint. Paragraph 2 is merely a weaker version of the provision proposed by the administrative law judge. The administrative law judge's proposal would have prevented respondents from establishing, via participant recruitment, a three-tiered distributional system. In response

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to respondents' objections, and in the interests of balancing legitimate business interests with the need to eliminate the deceptiveness of respondents' sales program, the Commission modified the judge's order to permit recruitment through three levels, with the third level recruits prevented from recruiting for a period of one year in order to interrupt the chain mechanism and ensure that participants in respondents' program understand that their profits must be derived from their own efforts at retail sales. The necessity for some limitation on recruitment of this sort was fully argued originally, and the Commission does not find new grounds presented for reconsidering its order in this regard.

Finally, with regard to the order, respondents object to the use of the term "marketing area" rather than "community or geographic area" to describe the unit for which respondents must under specified circumstances provide potential distributors with information concerning the number of other distributors already operating. The purpose of paragraph 7 of the order is to ensure that individuals who pay a valuable consideration for the opportunity to distribute respondents' products are given some idea in advance of the number of intrabrand competitors who will be trying to sell the same products in competition with them. That purpose can only be satisfied if the figures are provided for some relevant "marketing area." In modifying the phrase "community or geographic area" to market area for the purposes of paragraph 7 only, the Commission was concerned that use of the former term might itself provide the potential for serious deception. To cite two examples: (1) in some states it may transpire that the bulk of respondents' distributors are situated in a few localities. Provision of statewide figures only to a prospect

Order Denying Respondents' Motion for Reconsideration

in one of those localities may suggest a picture of low overall density, when in fact the prospect will face stiff competition intrabrand in the area in which he or she will actually be (2), provision of figures for a small community suggest the absence of competition when in fact there may be many competitors outside the community but still within the marketing area.

Obviously, the definition of "marketing area" is not capable of absolute precision, nor does the Commission expect that this will be achieved. It is, however, necessary for respondents to make a serious, good faith effort to apprise potential recruits who must pay a consideration beforehand of the amount of intrabrand competition they will face when they enter respondents' program, and we know of no other way to achieve this result than by the language employed in the order. As a matter of compliance, the Commission will, of course, allow respondents the latitude warranted by the necessarily less-than-absolutely exact order language. This is hardly an uncommon occurrence, and resolution is best left for the compliance process. (Cf. *The Regina Corporation v. Federal Trade Commission*, 322 F.2d 765, 769-70 (3d Cir. 1963).)

The other major argument raised in respondents' motion relates to the Commission's rejection of their "affirmative defense" of abuse of discretion, which they base on certain dicta in *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967). It was stipulated at trial in this matter that competitors of respondents used a system of distribution similar to that utilized by respondents. The administrative law judge properly ruled that this stipulation did not absolve respondents of liability for their illegal acts and practices, including the illegality of their marketing system. In reviewing this determination, the Commis-

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sion examined the evidentiary exhibits which respondents had introduced in support of their argument, and concluded that no evidence had been adduced which would suggest any abuse of discretion on the part of the Commission, and, therefore, the argument was similarly rejected on appeal. Respondents raise no new issues in their motion for reconsideration of this point that have not been fully litigated already. It is well recognized that the Commission is not obliged to proceed simultaneously against all law violators in a particular industry. See *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958). The Commission's resources are severely limited, and to impose a requirement of simultaneity upon it would render its statutory mission impossible of fulfillment. Additionally, the claim that the Commission has abused its discretion in bringing this complaint is at best an affirmative defense, that is, the burden is upon the law violator to exempt his unlawful conduct by proving it. As noted in our main opinion, respondents have not done that, and to require the Commission, as a condition of suing any given company, to hold hearings to determine that it has not abused its discretion, *i.e.*, to review in any single adjudication the conduct of every other member in an industry, would place an intolerable burden on this or any other law enforcement agency. Moreover, the Commission must reject respondents' apparent interpretation of the second sentence on page 25 of its Opinion in this matter, which respondents have cited in their motion for reconsideration. Insofar as the sentence is construed to imply that an agency abuses its discretion when it sues one law violator while neglecting simultaneously to detect and sue a violator whose practices are of equal scope and duration,

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the implication is erroneous, for it sets forth a standard for administrative action which is too constricting and which is not required by the dictates of *Moog Industries* and *Universal-Rundle*, *supra*.

The Commission does recognize that it must to the best of its ability, resources, and other statutory commitments, endeavor to eliminate serious violations of the sort engaged in by respondents that may be being engaged in by others. To this end, the Commission will treat the charges made by respondents in their motion to reconsider as a complaint from a member of the public, will refer this complaint to the staff for evaluation and appropriate action, and will welcome any additional specific information which respondents may provide. The Commission finds no reason, however, to warrant eliminating, or tolling the effective date of, order provisions designed to remedy what it has found to be a clear violation of law which threatens severe harm to members of the public.

Respondents' other argument, concerning the Commission's use of the word "substantial," raises no issue warranting reconsideration.

For the foregoing reasons, respondents' motion for reconsideration and related requests for relief must be denied. Therefore,

IT IS ORDERED that respondents' Motion for Reconsideration be, and it hereby is, denied.

By the Commission. Commissioner Nye not participating.

(Signature illegible)
Acting Secretary

ISSUED: October 1, 1974

Excerpts from Transcript of Hearing

[11]

* * * * *

So it would be difficult I think, for me to recommend an order which didn't have any successor or assigns language, and I have some other thoughts on the matter too, which we really haven't discussed here, but I gather there is a considerable amount of thought that the *Markle* case renders count one very questionable.

I doubt that. The *Markle* case involved a punch board where people took chances from one penny to 35 cents, and this, based on the allegations of the complaint, and of course I know absolutely nothing of this case . . . whether they can prove any bit of this or not . . . but based on the allegation of the complaint, we're dealing here with a sales program in which members of the public invest quite sizable sums of money and it's an entirely different matter. You're not selling a toaster or a electric blanket or something of this sort, or a chance on that. They're selling in effect, a distributorship.

And, it's by no means clear to me, far from it, that the *Markle* case renders this complaint obsolete in any manner at all.

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[12]

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The Commission, for whatever reason, didn't pursue *Markle* further. But that's all the *Markle* case stands for.

So under no account, would I ever dismiss count one on the basis of *Markle*. And if that's all on your minds, that's my judgement on that.

* * * * *

Excerpts from Transcript of Hearing

[14]

* * * * *

Mr. Wiseman: I wonder if I might address myself to certain points. I think it falls in the purview of the extent of this hearing today.

I am interesting in reducing the issues to the point that we could present the case . . . instead of a lot of superfluous things, or I might say the guts of the, of what's involved, . . . uh, would the Judge entertain a partial motion of summary judgement so that we can get a bid of those counts that are truly not in contention.

* * * * *

[16]

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Judge Hanscom: When you say motion for summary
[17] judgement, what are you thinking in terms of?

That you would move that I would dismiss certain counts of the Complaint? Is that what you're thinking of?

Mr. Wiseman: Yes.

Judge Hanscom: I'm not going to dismiss count one. Count one alleges sales of basically a lottery. As I understand, it the federal government in all 50 states and in the lottery statutes on the books . . . whether this is a lottery or not, I don't know . . . but it's alleged to be, and I would absolutely not dismiss count one.

Mr. Wiseman: Can we assume that to be so even if we presented a fact situation that there is no chance?

Judge Hanscom: Well, now this is another problem. We're pretty far down the road when the Commission issues a complaint. The Commission has issued a complaint alleging a violation of law.

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Excerpts from Transcript of Hearing

[18]

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Mr. Wiseman: I appreciate you don't want us to argue the merits. If you feel strongly, I will not.

Judge Hanscom: You're welcome to say whatever you want, but I think I've made the decision as I understand it, and what my obligations and responsibilities are, very clear.

All of this . . . I'm pre-judging . . . I don't know whether there's a scrap of proof of this or not. I don't know anything about it. All I know is what I have read in the Complaint and the allegations.

Mr. Wiseman: That's a point I want to make. You [19] say we have not pre-judged the matter, but let's assume that I'm able to bring a motion for summary judgement on count one.

Let's assume further that—

Judge Hanscom: You're welcome to do it if you want to. I can't stop you. If you want to do it, do it. I'll read it and give it very careful consideration, but on the basis of what I know now, reading both your memorandum and that of Complaint Counsel, I'm absolutely not going to dismiss count one.

Mr. Wiseman: I just want to make my point, and that is this:

Let's assume that I could show that there's no dispute of fact as to whether or not the element of chance is present. Let's just assume that fact momentarily. Would you still be in the position that under no circumstances would you dismiss count one, if I can show that factually the elements of the lottery couldn't be proven?

Excerpts from Transcript of Hearing

Judge Hanscom: Well, I . . . Of course, what is asserted in the motion for summary judgement and whatever is filed in the response thereto, I would consider obviously, very carefully, and if the factual allegations appear to be uncontested and the factual allegations don't sustain the allegations of the complaint, then I have to dismiss it I suppose.

* * * * *

[24]

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The problem is a little broader too, than this particular case, and that is when an order is accepted by the Commission, it then becomes a sort of precedent, however strong or not, it does become a sort of precedent, and this is one of a number of this type of case . . . well, I don't know if we have any other cases like this or not, but the so-called multi-level sales schemes or sales programs are fairly . . . excuse me. I picked up a term somewhere . . . The so-called multi-level sales programs have become apparently rather wide spread.

I think Complaint Counsel—

Mr. Wiseman: Just so the record will be clear, we have never, to the best of my knowledge, caused anyone to invest heavily or substantially. There's been no activity, to the best of my knowledge, in that direction.

I know it's mentioned before, and I don't want my presence here acquiescence, such be the fact—

Judge Hanscom: I understand. I'm making no suggestion.

I've read these papers and Complaint Counsel says there's 200 of them, and of course we've read about some

Excerpts from Transcript of Hearing

of them in the newspapers and so forth, and I know they all differ, and very possibly yours may bear no relation to any of those, but at any rate when an order is entered that has language, then [25] we are met with a demand for even handing treatment of everything else, and this type of language is difficult to resist in later orders where it may be quite inappropriate. I'm not saying that it can't be resisted, but it just presents Commission Counsel with . . . I'm just canvassing some of the factors, that's all.

So back to your question then . . .

Mr. Steiner: The question was . . . Essentially if you . . . If that . . . Maybe this is the improper time to ask, but if the language in that is changed to something similar to what you suggested, would a . . . If you made a recommendation, whether the order be accepted as dispositive of the issues based upon the allegations in the complaint, would your recommendation be favorable—

Judge Hanscom: Well, that was one problem. Now I haven't had a chance to look at the rest of the order. I think the order would have to contain some language in making it binding on successors and assigns.

Mr. Wiseman: I would like to talk to Mr. Simonsen again, in view of the comments made today, and I don't want to call him because I think this is a very serious thing, and I think it's something that ought not be decided lightly.

I very respectfully urge that perhaps it would be wise for me to go back and discuss this question once again with Mr. Simonsen.

Excerpts from Transcript of Hearing

[26] Judge Hanscom: With those two aspects which we discussed . . . successor and assigns and wholly and primarily . . . It seems to me that the rest of the order was . . . if you want to sign it I'll send it up and I'll . . . I certainly won't recommend against it.

* * * * *

Dale E. Meredith—for Commission—Direct

[45]

* * * * *

DALE E. MEREDITH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Steiner:

Q. For the record, please state your full name and address. [46] A. Dale E. Meredith Senior, 3730 Snyder Domer Road, Springfield, Ohio.

Q. Could you spell the street name for the reporter? A. S-n-y-d-e-r, D-o-m-e-r.

Q. What business are you presently engaged? A. Public relations for McCullough Properties.

Q. Since what date have you worked for McCullough Properties? A. Oh, around July of '71.

Q. 1971? A. Yes.

Q. Prior to your employment by McCullough, what were you doing? A. Well, we were involved in—with Symbra'ette Products.

Q. By "we" who? A. My wife and I.

Q. When did you start with Symbra'ette? A. December 1968.

Q. Just to make the record clear, when you say "Symbra'ette" are you referring to Ger-Ro-Mar? A. Ger-Ro-Mar, Incorporated, yes.

Q. Your future references to Symbra'ette will also be referring to Ger-Ro-Mar? A. Yes.

Q. When did you cease working for Symbra'ette? [47] A. Oh, we kind of phased out about January of '71.

Q. How did you first learn about Symbra'ette? A. A person that I had been previously acquainted with, by the name of Jerry Vinett, called me from Nashville, Tennessee.

Dale E. Meredith—for Commission—Direct

Q. Where were you, at that time? A. At home in Springfield, Ohio.

Q. How did you know that he was calling from Nashville? A. He told me he was.

Q. During that phone conversation, what did Mr. Vinett say to you and what did you say to him? A. Well, Mr. Vinett told me that he had found a company that had a method that he felt like we could make some money. He had become a distributor for Symbra'ette and they had a product where their method of operation was that you would recruit people and you would train people to recruit. And then, they would— Of course, he talked about the possible earnings of sixty or seventy thousand dollars a year. Well, you would just grow and grow and grow. He couldn't explain— As I tried to get more detail from him, he couldn't explain too much over the phone. So he wanted to make an appointment with me and come to Springfield, Ohio, and tell me more about it.

Q. Was an appointment made? A. Yes.

[48] Q. Did he come to Springfield, Ohio? A. Yes, he came to Springfield, Ohio.

Q. When did he come? A. December the 1st, 1968.

* * * * *

Q. At the meeting in the Holiday Inn, what did Mr. Vinett say to you and what did you say to him? A. Well, he explained to me that—the way he phrased it—that this was a buy-in thing, that you could come in at certain percentage levels by buying in, and at certain amounts that would range any place from up to \$5,000. And if you bought in at these particular levels, you could—your percentage

Dale E. Meredith—for Commission—Direct

would be higher, consequently, you would [49] make more money off your recruits.

Q. Were any materials used by Mr. Vinett to explain the program to you? A. Yes. Mr. Vinett used a manual.

Q. I show you a document, which has been received in evidence, identified as CX 74(a) through CX 74(z)(35), and ask that you examine this document very carefully.

* * * * *

Q. Mr. Meredith, is that an identical copy of the sales manual which you were referring to which was shown to you by Mr. Vinett? A. There has been some revisions in this as compared to the one Mr. Vinett showed me. It's basically the same.

[53]

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Q. Now, how did Mr. Vinette use this sales manual? A. Well, he went through the manual with me, page for page. And he presented it to me like this, and showed me the different steps.

Q. By "this," can you describe how? A. Well, he held the manual upside down to me, so that I could—everything was clear to me, and went step by step through everything.

Q. I see. A. That had to do with the percentage, recruiting, and things like this. And then, he took blank paper just like a tablet, and tried to emphasize the method of recruiting to where he'd, say, put a circle at the top, which would indicate my wife and I, and then, drawing lines off—like five lines off of that circle to indicate five of our recruits, and then draw lines off of our recruits and drew circles to indicate our recruits, recruits, and then, drew lines off of our recruits, recruits, and drew five circles to

Dale E. Meredith—for Commission—Direct

indicate our recruits, recruits, recruits, and then, he run out of paper. Then he went ahead to explain the overrides that we would gain by—off our recruits. And this is where he indicated that if we bought in at a higher level, possibly at \$5,000, which would indicate to us—which would make us district managers and gives us a higher percentage and this [54] would qualify us to draw more money off of our recruits, as we recruited them. And it would also allow us to draw more and more off of the recruits that they recruited.

Q. Did you read the sales manual when Mr. Vinett showed it to you? A. No. I didn't exactly read it. I think what it amounted to, I went over the sections that he emphasized more so than the others. But at that particular point, no, I didn't completely read the manual.

Q. Did you read parts of the manual? A. I read parts of it, yes, most of the parts that we did indicate.

Q. Did Mr. Vinett go through the second part of the manual—I'm referring now to CX 74(s) through the remainder of the sales manual—with you, as he did the previous part? A. No, not at that point.

Q. Now, based upon your—those sections of the manual which you did read, based upon the explanation by Mr. Vinett and of the graphs by him, what was your understanding of how the program worked? A. Well, my understanding of the program was that it was recruiting. The more people you recruit, the more money you make. There was no emphasis on anything else.

Q. Could you tell us whether or not in addition to the recruiting there was any other way, according to your [55] understanding of the sales program, one could earn money,

Dale E. Meredith—for Commission—Direct

in addition to recruiting? A. Well, you could have earned money by sale of products, which would mean that the girls would have to go out and either hold parties or door to door to sell the products. They would have to learn to be qualified fitters, and things like this. And yes, there could be money made, but of course, that wasn't where the money was.

Q. What do you mean by "that wasn't where the money was"? A. The money was in recruiting. Very few girls could qualify themselves to make much more than average living in the sales end of it.

Q. Now, regarding the recruiting, were you shown how to recruit others? A. Yes. This was the— The idea was that I would recruit the same as Mr. Vinett recruited me, by taking the manual and the different materials and go see the people and recruit them, and then, to take those people and teach them to recruit others and hold, possibly, opportunity meetings with them and their recruits, to teach them to recruit others.

Q. In addition to the sales manual and the piece of paper which you've talked about, were there any other materials used in soliciting your participation in the Symbra'ette program? [56] A. As time went on, yes. Other material was produced, such as the flip chart.

Q. Excuse me. I'm talking about Mr. Vinett's discussion with you, were there any other materials, other than the sales manual and the piece of paper, used in recruiting you? A. Except brochures and different pieces of company material, order blanks, application contract.

Q. How was the contract used? A. Well, the contract was a combination application and contract. And of course,

Dale E. Meredith—for Commission—Direct

it specified that once we signed this contract that we would—we, and those people we recruited, would operate according to the manual, which became a part of the contract.

Mr. Steiner: Your Honor, I have here a document identified Consultant Application, signed by Yvonne Meredith, dated December 2, 1968, and ask the witness if he can identify this document.

The Witness: Yes, this is the contract which we signed at the same time that Mr. Vinett was there.

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[59]

Q. Were both of you active in the Symbra'ette program?

A. Yes.

Q. How did that work? A. Well, my first efforts were finding some recruits. At the same time, Yvonne did some selling and had some parties. And she made an effort to get recruits at her parties. And I spent all my time recruiting.

• • • • •

Q. Did you attempt to recruit Symbra'ette distributors?

A. Yes, I did recruit Symbra'ette distributors.

Q. How did you go about attempting to recruit them?

[60] A. Well, I used the same method that Mr. Vinett had used with me. Once I had an appointment with them and got together with them, I used the manual. And I explained to them, step by step through the manual, how they could invest so much money and become—come in at certain levels, and how they could make money off of their recruits, and then how their recruits, by recruiting other people, could just be making them more and more and more money.

Dale E. Meredith—for Commission—Direct

And one thing that struck me, you know—and it's like I say, it worked just like a chain letter.

* * * * *

[61] Q. In addition to the sales manual, was any other material used by you in recruiting? A. Yes. I would use the—a piece of paper to diagram on, along with brochures, order blanks, and contracts, which we purchased from Symbra'ette.

Q. OK. How did you use the contracts themselves in recruiting? A. Well, we would use the— Recruiting is something like making a sale. You usually finalize with the contract, go over it with the recruit, and explain to them that we were all committed to working by our sales manual and other such promotional materials that the company would provide.

Q. I see. Mr. Meredith, I show you a document, although it would more clearly be called a flip chart, which has been received into evidence as Commission Exhibit CX 75(a) through CX 75(z)(16). And I ask you if you can identify this document. A. Yes. This is a flip chart which the company introduced later for promotional material.

Q. How did you first hear of this flip chart? A. Well, it was introduced to us in a letter.

Q. I see. How did you obtain the flip chart? A. Well, new order forms were sent us, which included the flip chart, and we filled that out.

Q. Mr. Meredith, I show you a document which has been [62] received into evidence as CX 78 and ask you if you can identify that? A. Yes, this is an order form where we could order our literature.

Q. I draw your attention on CX 78 on the left-hand column, an item entitled recruiting flip chart (37 pages),

Dale E. Meredith—for Commission—Direct

is that the document that you—is that the item that is referred to you as the flip chart? A. Right.

Q. How did you— How did you utilize this order form to obtain the flip charts? A. We filled in the order and sent a money order in.

Q. To whom? A. To Symbra'ette, Ger-Ro-Mar.

Q. Did you use a flip chart in your recruiting? A. Yes.

Q. How did you use the flip chart in your recruiting? A. Well, I would go into a home and where I had a man and wife, and I would usually start at this point, because—

Q. Excuse me for a minute. For the record, let's note that "this point" is Exhibit 75(p). A. It had been suggested to me that I clip these back. And in my recruiting, go from this point, where it made—

Q. Who made that suggestion to you? A. It was suggested in a hot-line letter from [63] Symbra'ette that if we chose to—if our purpose was training sales people, to emphasize this part, if our purpose was recruiting, to emphasize this part.

Q. Now, "this part" referring to what? A. The recruiting section of the—

Q. Of the what? A. Flip chart.

Q. OK. A. This would introduce the business of Symbra'ette custom fitted bras and girdles as a good full-time or part-time for husband or/and wife teams. Then it would go ahead to explain the different levels that you could go in at with the top level of the company being regional manager.

Q. What— Let me add that at this point in time you are referring to CX 75(r). A. We would explain the percentages.

Dale E. Meredith—for Commission—Direct

Q. By using what page? Let me state that at this time you are talking about Commission Exhibit 75(s). A. And here we would introduce to them using the sponsor system to build sales organization, and it works like this.

Q. Those words are contained on, for the record, CX 75(t). A. Of course, here was the—here was the—where we used to improvise—draw our circles and everything. Here is the method we used. And of course, along with this, I would [64] also use the piece of paper where I made the circles.

Q. Excuse me. By "here" you are referring to Exhibit CX 74(u). A. And this would show them how they could be at the top of this thing and how they could recruit people and their recruits recruit people and right on down the line. You could create a chain that would involve—

Mr. Wiseman: I would object to that as calling for a conclusion.

Judge Hanscom: I'll overrule that, Mr. Wiseman. Will you proceed, Mr. Meredith.

The Witness: You could create a chain that would take in, probably, your recruits recruiting, their recruits recruiting more recruits, and more recruits, and more recruits.

I went down this thing once, and I think I got to 44,000 people that I could have involved in this, if I could find that many people that would invest.

By Mr. Steiner:

Q. Could you yet go further and show how the different— A. Yes. We would go completely through it as how they could make it selling, how they could go into the party

Dale E. Meredith—for Commission—Cross

plan, and so forth. But of course, I could just scan over this, because recruiting was the name of the game. We were out to recruit.

Q. Did you show them each of the pages? [65] A. Yes, I would show them each of the pages. And naturally, they would stop you and you'd have to get into detail on some of the pages.

* * * * *

Cross Examination by Mr. Wiseman:

[70]

* * * * *

Q. Did you ever recruit anybody? [71] A. Yes.

Q. Can you name the recruits? A. Not all of them.

Q. Can you name some? A. Yes.

Q. Who did you recruit? A. Well, we recruited a Marge Scott and Elmer.

Q. Who else? A. I recruited an Isabel Aaron, Shirley Jones.

Q. Let's have that last name, again. A. Shirley Jones.

Q. Can you name any others? A. Marge Puckett.

Q. Yes. A. All together, we recruited 15 directs.

Q. All the time you were with Symbra'ette you recruited 15 people. Isn't that correct? A. Well, we—I was involved with recruiting many more than that. Because, you know, your recruits recruit people.

* * * * *

[73] Q. Do you have any recollection as to the dollar value of the Symbra'ette products sold by your wife and yourself? A. Yes. In her first year, she possibly gained commissions of maybe \$1,500.

Dale E. Meredith—for Commission—Cross

Q. Which means she sold how much dollarwise in products? A. Must have been around three or four thousand dollars.

Q. At least three or four thousand? A. Yeah.

Q. Or just three or four thousand? A. At least three or four thousand.

Q. At least three or four thousand dollars worth of products were sold. Is that correct? A. Uh-huh.

Q. Now, do you have any recollection as to the dollar value of sales to distributors of Symbra'ette products? A. Yes. The first year we recruited 11 senior keys at a retail purchased volume of approximately \$1,500 a piece. So that would mean it would run between \$15 and \$16 thousand in sales to recruits.

Q. The products you sold then were three to four thousand directly to consumers— A. Right.

Q. —and another additional \$15,000 to other dealers. A. Yes.

[74] Q. Mr. Meredith, did you mention the words "buy-in" in your direct examination? A. Yes.

Q. What did you mean by "buy-in"? A. Well, you would buy into the business. You would buy into the privilege of being a dealer for Symbra'ette.

Q. How much did you invest in your buy-in, Mr. Meredith? A. I think \$800—\$742.

Q. You testified to \$700? A. Yeah.

Q. But yet you sold, after that buy-in, \$15,000 worth of merchandise. Isn't that correct? A. Right.

Q. Now, when you bought in at the so-called \$700 price, what did you receive for that money? A. Well, I received the—received some inventory supplies, and the right to become a distributor to Symbra'ette.

Dale E. Meredith—for Commission—Cross

Q. What type of inventory did you receive? A. Well, I think it was mainly bras and girdles.

Q. Do you recall the value you paid for the bras and girdles?

Mr. Steiner: Objection; he can't possibly know the value of the products.

Mr. Wiseman: I think this, Your Honor: He seems to have a lot of details that he expressed in direct examination, [75] and apparently is the type of witness that holds a lot of details. I wonder if he couldn't testify to—

Judge Hanscom: I think he can testify as to the operation of the plan, Mr. Steiner, if he remembers approximately the value. By that you mean resale value, I suppose.

Mr. Wiseman: Or his purchased value.

Judge Hanscom: Purchased value?

Mr. Wiseman: Yes.

Judge Hanscom: Can you answer the question?

The Witness: I think our purchase value was around \$700.

By Mr. Wiseman:

Q. So for that \$700 you got brassieres and girdles, did you not?

Mr. Steiner: Objection, Your Honor. He's testified—

Mr. Wiseman: So there's really no buy-in value, is there.

Dale E. Meredith—for Commission—Cross

Judge Hanscom: Just a minute. We've got to have an orderly procedure. Counsel has made an objection here. What is your objection?

Mr. Steiner: My objection is that he has already testified that, in addition to the inventory and even the inventory value, he's also purchased the right to participate in the Symbra'ette plan. And at this point in time, I feel [76] that Mr. Wiseman is not only leading the witness, but answering the question himself.

Judge Hanscom: It's cross-examination. I think we can let Mr. Wiseman proceed. I see no impropriety here.

By Mr. Wiseman:

Q. Mr. Meredith, you testified earlier that you bought in on the Symbra'ette distributor. Isn't that correct? A. Right.

Q. The buy-in price is about \$700; isn't that correct? A. That was my particular amount.

Q. Yes. The values of the brassieres and girdles you received was approximately \$700; isn't that correct? A. Who sets the value?

Q. You just did in your testimony. A. I said that's how much I paid to the—to become a part of Symbra'ette, yes.

Q. OK. So what's left of the buy-in value? A. I don't really know.

Q. OK. Mr. Meredith, when you bought the \$700 worth of brassieres and girdles, were they for the purchase of reselling to others? A. Yes. They were demonstration kits, you might say.

Dale E. Meredith—for Commission—Cross

Q. If you had sold these brassieres and girdles to others, how much money could you have realized? A. It's impossible to sell those brassieres and girdles [77] to others.

Q. It's impossible— A. That's right.

Q. —to sell Symbra'ette brassieres and girdles? A. I'm talking about the \$700 sample kit would have been impossible for any girl to completely get rid of, due to the sizes, fits and such as this. That's why I call it a demonstration kit.

* * * * *

Q. Now, you mentioned also that recruiting is the name of the game. Isn't that correct? A. Right.

Q. Could you identify any source within the Symbra'ette organization that played recruits, the name of the game? A. Identify? You mean people?

Q. Literature, papers, documents, conversations, everything. [78] A. Every piece of literature they put out indicated recruiting as the name of the game.

Q. Can you identify anything specifically? A. Yes, your flip chart.

Q. Now, Mr. Meredith— A. Your manual—

Mr. Steiner: Let him answer the question he's asked.

The Witness: Every news letter that came out was almost—was 75 percent recruiting. So recruiting's the name of the game.

* * * * *

Q. Today, neither you nor your wife is involved in any way with Symbra'ette products. Isn't that correct? A. That's right.

Dale E. Meredith—for Commission—Redirect

Q. Is it known that other distributors drop out of the Symbra'ette program and market plan? A. Yes.

Q. So it's possible then for Symbra'ette to pick up distributors and lose distributors. Isn't that correct? A. Right.

* * * * *

[90]

Q. Now, how many times did you repeatedly buy merchandise [91] from Symbra'ette, after your initial order of \$700? A. I don't know, considerable.

Q. Could it be more than 50? A. Oh, yes.

Q. So during this period of time, from December 1968 to January 1971, you had reordered merchandise from Symbra'ette in excess of 50 times. Isn't that correct? A. Oh, very probably.

Q. Isn't it a fact, sir, that merchandise was sold to you after the initial order. A. Yes.

Q. Didn't that occur 50 times within three years? A. At least.

Q. From that, you judge that recruiting is the name of the game? A. I know that recruiting is the name of the game. Much of the merchandise we ordered were sold to recruits.

* * * * *

[99]

Redirect Examination by Mr. Steiner:

Q. You also described or used the term "buy-in" and clarified it a little bit. When you paid \$742, at the time you signed the contract, what did you understand you had purchased for that \$742? A. My personal understanding

Colloquy

was that I had purchased the privilege of recruiting people and being paid override on these people. I realized that there was some inventory and supplies involved and, of course, you needed this inventory and supplies to show to people to recruit people.

* * * * *

[105]

Mr. Steiner: Your Honor, as to CX 82, which we have just—which is the film which we have just seen, let it be stipulated on the record between parties that:

Number one, the film is authentic and genuine;

Number two, that the film has been produced for and under the direction of Symbra'ette;

Number three, that the film is the same film referred to on CX 78 and 79, which are the order forms, which have already been received into evidence;

Number four, that the film has been ordered by [106] Symbra'ette distributors located in states other than California; and

Number five, that the film has been shown by said distributors to prospective distributors located in states other than California.

Mr. Wiseman: We will so stipulate.

* * * * *

John F. Sanford—for Respondent—Direct

[131]

* * * * *

JOHN F. SANFORD was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Judge Hanscom: Will you take a seat there.

State your name and address.

The Witness: My name is John F. Sanford; 5465 Curry Ford Road, Orlando, Florida.

Direct Examination by Mr. Wiseman:

* * * * *

[134]

* * * * *

Q. At the time you became a distributor of Symbra'ette products in 1968, did you purchase any Symbra'ette products? A. Yes.

Q. Do you recall the amount of your first order? A. Yes, sir. \$500.

Q. That was the amount you paid for Symbra'ette products. Is that correct?

* * * * *

[135]

* * * * *

Q. When you say "retail sales," who is the purchaser in that instance? A. Your average housewife or any lady is the purchaser. This is a sale, just like a sale from a store to a customer.

Q. I see. So the sale we're talking about is a sale to the ultimate consumer. Is that correct? A. That's correct.

Q. Are you able to estimate as to the volume of such retail sales annually, as far as your distributorship is concerned? A. Annually? Based upon the state of her

John F. Sanford—for Respondent—Direct

health, it's from \$6 to \$10 thousand up to \$12,000 a year. It varies. She has a bad back, and that limits her sometimes.

Q. Let us take an average year where her health is good and activities are not overbearing. What would you estimate to be the annual volume of the retail sales, as far as your distributorship is concerned? A. Roughly \$12,000.

* * * * *

[136]

Q. When did you— Let me ask you this question: Has your distributorship ever sponsored other distributors? A. Oh, yes.

Q. When did you first sponsor a distributor? A. During the first few weeks of the business, we had eight people to ask us how they could get into this business, because they saw the impact of the sales, the reception of the products, there in Huntsville. And they asked us how they [137] could get in. And we helped them to get into the business.

Q. Did this take place after you sold the first \$2,000 worth of business? A. Yes. Well, I would say we had probably sold \$1,500, before the first one asked. And then, as we grew—as our sales grew, more people got interested.

Q. How many distributors have you sponsored since 1968? A. Roughly, I would say, probably, 100 directly.

Q. How many are still with you, as active distributors? A. Between 40 and 50.

Q. So presently, the number of active distributors that you have is how many? A. We have, I would say, a rough guess—and this is not by count—but I would say, we have approximately 60 directly-sponsored people.

John F. Sanford—for Respondent—Direct

Mr. Steiner: I'm sorry, I missed that.

The Witness: Sixty.

* * * * *

[138]

Q. Have you had the occasion to examine— Let me ask you this, first: What products does Symbra'ette sell? A. Symbra'ette sells bras, girdles, swimwear, sportswear and lingerie.

Q. I assume that Symbra'ette has competitors in this field. A. Oh, yes.

Q. Have you ever had the occasion to examine the products—some of the products from their competitors—of their competitors? A. Yes.

Q. What did you observe? A. Symbra'ette's quality is much better. It's a much better made product.

Q. I think that you have testified that when you first became a Symbra'ette distributor you had purchased Symbra'ette products. Is that correct? A. Right.

Q. The amount of the purchase, I think you testified, [139] was \$500. Is that correct? A. Uh-huh.

Q. Were you required to make any payments at the time you became a Symbra'ette distributor, other than the purchase of products? A. No, sir.

Q. Now, the \$500 that you refer to, what does this represent? A. It represents saleable merchandise, and necessary tools, such as brochures, to pass out to your prospective customers.

Q. Now, the value of the products that you had purchased from Symbra'ette at the time you became a distributor, could you attach any label or name to this type of purchase? A. The merchandise— I may not have

John F. Sanford—for Respondent—Direct

your question exactly right. But the merchandise we bought was for resale to retail customers.

Q. So is it correct to say that this amount, the \$500, represents the wholesale-purchase price of Symbra'ette products? A. Right.

Q. After you made the initial order, did you ever re-order Symbra'ette products? A. Oh, yes, sir, quite often.

Q. Considering now the first reorder of Symbra'ette products—that is the first order after your initial order—[140] was there any change in price for your purchase of Symbra'ette products? A. No, sir.

Q. What was that? A. No, sir.

Q. Does the purchase price of Symbra'ette products for distributors increase or decrease, immediately following the initial order? A. No.

* * * * *

[148]

Q. What is your present profit, annually, as a Symbra'ette distributor? A. Roughly, \$20,000.

Mr. Steiner: I'm sorry.

The Witness: Roughly, \$20,000, on an average.

By Mr. Wiseman:

Q. Does this represent the fact that you and your wife work as a team? A. Yes.

Q. How much time does your wife spend on this program? A. Roughly, full time—a full-time job with her.

Q. Approximately, how much time do you spend on this program? A. I spend, I would say, 25 hours a week on it, after working 40 hours for Uncle Sam.

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John F. Sanford—for Respondent—Cross

[155]

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Cross Examination by Mr. Stone:

Q. You talked about the marketing plan in your testimony before. What did you understand the marketing plan was? A. What did I understand the marketing plan was?

Q. Yes. A. I understood the marketing plan was basically retail sales. And if you put enough effort into it and learned the business, that you could help other people to get into the business, and that you could earn an override from helping them.

* * * * *

[175]

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Q. You testified on direct examination that you made \$20,000 profit. Was that for a year or since you joined the program? A. No, that's based on a year. That's not—That's not since we've been in business. Six years. That wouldn't be too much profit.

[176] Q. I don't understand. You say, in a good year you make \$12,000 gross sales. A. I think you're— We'll go back. We do earn on what the people that we bring into the business do; plus our retail sales. Or more amply stated, we earn on a retail sales, as the marketing program shows you, plus an additional on what the other people that we bring into the business do in their business.

Q. Finished? A. Yes.

Q. I'm going to repeat, I suppose, but I just want to be sure I understand. \$12,000 in a good year is not profit, it's gross sales. So something less than \$12,000 would represent profit. Would that be a fair statement? A. I would have to—probably to give you the best answer of my ability

John F. Sanford—for Respondent—Cross

—and I don't have any figures to back this up; and I'm merely giving you the best answer that I possibly can; because I didn't come equipped with figures—but I would have to say that probably \$10,000 or \$8 to \$10 thousand would be a good figure, because bear in mind that we buy at 60 percent discount.

Mr. Steiner: That is a profit on your own direct sales?

Mr. Wiseman: I'm going to object to two attorneys propounding interrogatories. We have to limit it to one.

[177] Judge Hanscom: Yes. The questioning must be by one. So Mr. Stone, you propound the questions. Mr. Steiner, write Mr. Stone notes, if you want him to ask something.

Mr. Steiner: Surely.

By Mr. Stone:

Q. So in a good year \$12,000 gross sales represents 60 percent of it would be profit? A. Yeah. Sixty percent will be profit, because she buys at a 60-percent discount. Now, I'm not going to say that her sales would be limited to that, because I don't know. I mean, I didn't come prepared to go into figures and try to figure that out. But if she had— I'm giving you the best answer I can.

Q. You used the figures, on direct examination. A. That's what I'm doing. I'm giving the best figures I can.

Mr. Wiseman: Let's not argue with the witness.

Judge Hanscom: No arguing with the witness. The fact is though the witness did testify to certain

John F. Sanford—for Respondent—Cross

figures, and counsel is entitled to test him on those figures and question him out.

So will you proceed, Mr. Stone?

By Mr. Stone:

Q. Getting back to the figures, again, I realize \$8,000 or 60 percent of \$12,000, are roughly—my mathematics are [178] not very good—\$7,000 or \$8,000 is profit that you and your wife made on your own direct sales. A. That's a fairly good assumption. I can't say that it's exact. But it's a good guess.

Q. \$20,000 profit would represent that \$8,000 that you made in direct sales, plus, give or take \$1,000 or \$2,000, \$12,000 in overrides that you received? A. Plus the fact that for the volume that she does, she and the people that she has helped get into this business, she earns, based on a volume level, if they do \$12,000 or \$15,000 in a given month, she will earn a \$200 special performance bonus, which has to be counted into that. This is paid by the company and it's for performance. And that's what the name of it is, and that's what it's for. So you can add that in. Yes, that's— I would have to say that's about as close as I can guess at it.

* * * * *

[179]

Q. Let me show you a copy of Commission Exhibit 71. It's entitled Purchase Volume Discount Record. Can you explain to me what the document represents? A. If I can read it?

John F. Sanford—for Respondent—Cross

Yes. I can tell you what it represents. It represents the purchase volume discount record which is what she earns her discounts on, on this right here, plus this, is what she earns, based on bringing these people into the business, based on their volume.

Q. This is what it would be for a month? A. Yes.

Q. For January '71? A. That would be for a month.

Q. Your wife is listed here as district manager. And there is a figure of \$5,474.25. What does that figure represent? A. To me, that would represent her personal purchases from the company.

Q. That's what she ordered from the company? A. Right.

[180] Q. Would that be the 60-percent figure? A. That would be bought at— No. That would be the— That would be the total. Well, are you prepared for about 15 minutes of explanation to explain that figure right there? —I mean, the technicalities behind how that figure is arrived at? This is the retail value minus a certain figure of which she earns a discount on.

Judge Hanscom: So the record will be clear, you used the words "this is," what is "this"? This is the figure \$5,270?

Mr. Stone: \$5,474.25.

By Mr. Stone:

Q. I realize there are some technicalities, but would it be fair to say this is not what you paid for the goods but what they're worth, if she was going to sell them? A. Right.

Q. What is Alberta— A. Alberta Bond.

John F. Sanford—for Respondent—Cross

Q. She is what? —a senior key? A. At that time, she was a senior consultant.

Q. There's a figure there of \$682.45. A. That was her purchases from the company.

Q. From the company? A. From the company.

Q. Not from your wife? [181] A. No, from the company.

Q. There's a percentage figure of 15, what does that mean? A. That means that my wife earned an override of 15 percent on what Alberta Bond's volume was, for going to Evansville, Indiana, and training her and helping her with this business; keeping in contact with her monthly by telephone and quite a few letters.

Q. So Alberta Bond was directly sponsored by your wife? A. Not directly sponsored by my wife, no. She was sponsored by her sister-in-law, who decided that she was not cut out for sales of any kind. And we inherited Alberta by, as I said, the—

Q. What was her sister? A. Her sister-in-law, not mine.

Q. Sister-in-law. What position did she hold? A position in Symbra'ette? A. Yes. She was a district director or district manager in Symbra'ette.

Q. Sponsored by your wife? A. Yes.

Q. So Alberta Bond was sponsored by your sister-in-law. Is that correct? A. Her sister-in-law.

[182] Q. So your wife gets 15 percent of her retail sales? A. Right.

Q. Is that generally true for, Faye Moore, the next person? A. Faye Moore was directly sponsored.

Q. Directly sponsored by your wife? A. Right.

John F. Sanford—for Respondent—Cross

Q. Sylvia Morris? A. Sylvia Morris was directly sponsored. No. Sylvia Morris wasn't. The second time Sylvia Morris came into business, she was directly sponsored. She was indirectly sponsored and she went out of business and stayed out for a while. Then she decided she wanted to come back in. So wrote us a letter. We went to her hometown and helped her get started again.

Q. You said indirectly sponsored. Who was she sponsored by? A. Jim and Mary Jennings.

Q. Who sponsored Jim and Mary Jennings? A. We did.

Q. What about Ruby Edge? She's listed as a supervisor. A. Ruby Edge was sponsored by Sue Cooper. Sue Cooper became ill and could not continue. So Ruby Edge, by closing the ranks, became directly sponsored by us.

Q. Darren Wasson? [183] A. Darren Wasson, same process. She came to us directly because her sponsor just decided this wasn't the business for her.

Q. How about Ina McGhee? A. Ina McGhee was directly sponsored by us. And if my figures are correct, my memory is correct, she came in March of 1968. And I would say that she retailed more merchandise than anybody in the company.

Q. Has Ina sponsored anybody? A. Yes, several people.

Q. And does your wife get an override on— A. Not on these people. It's on this volume.

Q. This volume? A. Right.

Q. But the people that Ina would directly sponsor, their sales would become part of Ina's purchase volume? A. Yes. The best way I can explain it to you is like Metropolitan Life Insurance Company, the debit agent collects the payment, the supervisor earns a percentage of his col-

John F. Sanford—for Respondent—Cross

lections, the district manager earns a percentage and on up the line. That's the best way I can explain that to you.

Q. So in other words— Let me paraphrase it again. So Ina McGhee's directly sponsored supervisors senior keys, retail sales that they made become part of her purchase volume. A. Right.

[184] Q. And that purchase volume your wife gets 15 percent? A. No, five.

Q. Five percent.

I show you Respondent's Exhibit 129, which was just received into evidence. It's entitled Monthly RPV Record. Can you— The name on it is Beth Vinett, and your wife is listed as sponsor. A. Uh-huh.

Q. Can you explain some of the figures? The first column is the month. That's self-explanatory. It says: Personal Purchases. And there's a column of figures under that. Can you tell me what those figures represent? A. Those figures right there, in this column, represent personal purchases by Beth Vinett by the month.

Q. From? A. From the company.

Q. And that represents the value that she was going to sell them to a consumer? A. Approximately.

Judge Hanscom: Is the column clear in the record?

Mr. Stone: I believe so.

Judge Hanscom: Is it clear in the transcript?

Mr. Stone: Personal Purchases Column.

Judge Hanscom: It's labeled that?

Mr. Stone: Yes, sir.

John F. Sanford—for Respondent—Cross

[185]

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A. Personnel Group RPV, as I said, the people she, herself, and the people below her brought into the business.

Q. Does your wife get an override on these? A. She gets an override on this right here.

Q. She gets an override on Personnel Group RPV? [186] A. Total RPV.

Q. Total? A. Total RPV, right.

Q. What percentage does she get? A. At that time, it was five.

Q. Five percent. A. No. At that time, it was three percent. Because Beth Vinett— Let's see what time we're talking about now.

Q. April 1970. A. April 1970—

Q. Looks like December 1971. A. Probably from right here up, three percent; and from here down, five. Because the marketing program changed at that time.

Q. It went up or down? A. It went up. It went up, because they put in the regional director level.

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[187]

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Q. Would it be fair to say that this total RPV column of Beth Vinett's monthly RPV record represents her directly and indirectly sponsored supervisors, senior keys, keys? A. Plus her personal volume, yes.

Q. Plus her personal volume, all right.

And each person that was directly and indirectly sponsored by Beth Vinett had the right also to sponsor other people. Is that correct? A. Sure.

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John F. Sanford—for Respondent—Cross

[192]

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Q. But would it also be fair to say that the more people in your organization selling, the more money you're going to make? A. Absolutely.

Q. You testified on direct examination that your wife or you or both of you paid \$500, I think, when you joined the program. A. This is— To the best of my ability to tell you, yes, this is what it was. It wasn't to join the program. It was to buy merchandise. There's quite a difference there.

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[195]

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Q. On or about February 1, 1968, your wife joined the Symbra'ette marketing program. A. Right.

Q. Is that correct? A. That is correct.

Q. She paid \$500, to the best of your knowledge? A. To the best of my knowledge, she paid \$500 at that particular instance.

Q. She paid \$500— A. To buy merchandise.

Q. Merchandise. A. To sell.

Q. And at that time, she also became a member of the Symbra'ette organization. Is that also correct? A. Right. Within a very short period of time. I don't know the exact date. I could go back to the bank records and check and see. But within a very short period of time, she went to the bank and borrowed \$1,200 more to buy merchandise to sell, that she had sold—had orders for, within this short period of time, within, I'd say, 10 days or less.

Q. The time that she made this purchase, she was a [196] member of the Symbra'ette organization. A. The next purchases, yes. She had to be or she couldn't buy from the company.

John F. Sanford—for Respondent—Cross

Q. Let me carry that last question just a step further. Would it be fair to say— Let me rephrase that.

When she became— After she paid her \$500 and subsequently purchased some additional merchandise that you just testified to, she became, at that time, a member of the Symbra'ette marketing program. A. No, sir. She became a member of the Symbra'ette marketing program, when she made her initial purchase. She purchased merchandise— The next purchase you're talking about was for saleable merchandise. It was not—

Q. So when she paid her \$500, at that time, did she have the right to sponsor other people? A. Certainly, provided that she could train these people.

Q. And any person that she sponsored had the right to sponsor other people. A. Yes. To my knowledge, there's nothing that says that you can't sponsor people. The only stipulation we make is that you train these people.

Q. So anybody that joins the program at whatever level has the right to sponsor other people. A. Oh, absolutely.

[197] Q. Did this have any value or any influence on your wife—you or your wife joining the program? A. Yes. It most certainly did. And it would be obvious to say that anybody that didn't take it into consideration certainly should not be allowed to come into the program, because they are not capable of understanding the program and we do try to screen our people.

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[207] Q. When somebody comes to you interested in joining the Symbra'ette organization, do you make any— have you made any financial representations to them? A. Have I made any financial representations to them? Not—

John F. Sanford—for Respondent—Redirect
Dirk Wassenaar—for Respondent—Direct

Not what they are going to make, no. I show them what their discounts are and what their overrides are. And that's as far as I go with that.

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Redirect Examination by

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[216]

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Q. Now, in Commission Exhibit CX 71, you mentioned there that, on cross-examination, it appears that the question was whether or not you were a district director or district manager. I'd like to have you look at CX 71, and tell me precisely what the title of your distributorship was.

A. Regional manager.

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[231]

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DIRK WASSENAAR was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wiseman:

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[238] A. Yes. I think this program does offer a unique opportunity to many members of our society who would like to engage in a small business, but who, obviously, would not be able to enter into a small business opportunity because the resources and the experience involved are not available to them.

I think this kind of program offers a unique opportunity to that kind of an individual.

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Dirk Wassenaar—for Respondent—Direct

[244]

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Q. Dr. Wassenaar, a multi-level direct selling program which requires an initial operating inventory for distributors in the neighborhood of \$200, in your opinion, is such a program a fair business opportunity? A. Yes. I would go one step further. I would say it is a unique opportunity, because there are very few small business possibilities for anyone open with this kind of a money—this kind of a capital. Most small business opportunities would require capital which would be orders of magnitude higher than this, yes.

[245] Q. A multi-level direct selling program in the nature of a sponsored-type program in which a participant can only join the program at the lowest level and has to work his way up to the higher levels by increasing the sales, in your opinion, could such a program be a fair business opportunity? A. Yes, it certainly is.

Q. A multi-level direct sales program, Dr. Wassenaar, in which a participant can be refunded in full for his initial purchase within a period of time—such as: 30 or 90 days—in your opinion, does such a program present a fair business opportunity?

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[260]

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Q. How does the Symbra'ette marketing program differentiate itself from the traditional direct-selling marketing programs? A. I would say it is more performance oriented. It is more competitive in many ways than a more traditional program. For instance, if I hire someone to sell in a certain district and a person does not work out very well, the potential of that district is gone. Under the

Dirk Wassenaar—for Respondent—Direct

Symbra'ette program, if the distributor doesn't go around actively after the business someone else can. There's not the territorial protection that many of the more traditional programs have it. Again, it is not a salary. It is the margins that you earn from your activity. So I would, in general, say it is an aggressive result oriented program. From a marketing point of view, it's very desirable.

Q. Are there any other differences besides that? A. Yes. I think the program has a unique aspect in a sense that—

Q. Excuse me. Which program? A. The Symbra'ette program. The Symbra'ette program has a unique aspect, in a sense that it has the ability to develop rather quickly. I mean, rather than a sales manager going out and trying to locate, interview, train salesmen, in the Symbra'ette program there will be several persons who are [261] interested in trying to locate new consultants that can do

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Q. Under the old Symbra'ette program, once a person signed a sales agreement to become a distributor, is it not true that each person had the right to go out and seek additional distributors? A. Yes. To my knowledge, each member of the organization can sponsor new members, yes.

Q. Was there an incentive for him to do so? A. Well, I would say certainly. Also, I must state at this time that some people might have only looked at the benefits and not the trouble going with this. But certainly, I think it would be and was an attractive feature of the plan.

Q. What were the benefits involved? A. The benefits were that if the new sponsored person would be successful

Dirk Wassenaar—for Respondent—Direct

the person that would have brought him into the organization and would have trained him and supervised him and taught him the trade, per se, would benefit from the sales that this new person would generate, yes.

Q. When you say the sales that this new person would generate, does it matter whether or not the new person actually sold or were the overrides or benefits based on the new person's purchases? [262] A. The benefits were related to all the purchases the new individual made from the company, yes.

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[273]

The Witness: First, I think, what Mr. Steiner is hinting at here— And of course, this is a well-known term that is applied to this kind of a program, when they talk about [274] pyramid programs. And of course, if you take an abstract model in which you state certain basic assumptions— And let me just give another example. If I have a business of myself today, doing a half million dollars a year and I double within one year and I double again, I can prove quickly that within 25 years I will sell more than the total gross national product of the whole country. But obviously, is that extrapolation reasonable, is it in accordance with facts, it remains to be seen. So certainly, if Mr. Steiner wants me to show here that if you take certain of these basic assumptions and you put you here and take the same kind of organization, I think you can prove quite clearly that before long the whole country will be working for you. I find this is an exercise in futility.

Dirk Wassenaar—for Respondent—Cross

Because I think this is not at all in correspondence with the facts. I think yesterday we heard an interesting case—

Cross Examination by Mr. Steiner:

Q. Doctor, I hate to interrupt you, but I think I have a right, since I did ask you a question. I would like—

Mr. Wiseman: I wonder if the Court would like to hear the complete answer here.

Judge Hanscom: Finish your answer, Dr. Wassenaar. The problem is, of course, that I suppose the doctor could go on all morning, and there would have to be a certain point which I would have to stop him. Continue.

[275] The Witness: To this specific question, I could not say how long it would last before the whole country would be working for you, but it would be a limited amount of years. I think we can all agree on that. But I think I should point out that this is just a model. It doesn't fit reality. I think it's futile to engage in this at this point. I think just yesterday you showed some beautiful evidence of people, people discontinuing, dropping out and later coming back. I think we should stay realistically. And I think the facts of this case indicate that after 10 years there are only 3,000 distributors. So obviously, the question of saturation, the whole country working for this company, is probably not even at hand.

Dirk Wassenaar—for Respondent—Cross

By Mr. Steiner:

Q. Why is that model a picture of futility? A. The key factor not in this model is the fact that there is an opportunity. And in practice, you will find that this happens very often, that distributors go into this for a while and they get tired of it or they find greener pastures or they get pregnant or they get married or they get transferred and they give up this particular kind of program. So you have to consider a drop-out rate. Now, certainly, if you have a certain number of local distributors already, any new person joining the organization will recognize a certain amount of saturation is taking place, you are now competing. You are not [276] alone in the Santa Clara Valley, but there are others. Like any other business opportunities, this limits the potential market and anyone will see it. So as the company grows, the number of people that will join the company will become smaller, the number of people dropping will probably increase and this thing will balance out to some kind of an equilibrium.

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[288]

By Mr. Steiner:

Q. If the multi-level feature of the Symbra'ette sales program were eliminated from the Symbra'ette marketing program, by the elimination of that feature we still have a marketing program which involves party plans, sales, and fitting [289] by distributors, which involves selling the product, the quality of which— I, personally, have never had an opportunity to use it—but the product of which there

Dirk Wassenaar—for Respondent—Cross

has been no dispute as to the quality, if the multi-level feature—meaning the sponsoring feature—were taken away, would it have any adverse effect on Symbra'ette?

A. Yes, I think it would certainly be disadvantageous to the company, because the program, as you described it, as a more traditional program, would involve a very substantial task upon the company of hiring and training regional managers, hiring and training individual salesladies to go around. There's a high turnover in this kind of an area. So it would be a continuous kind of effort on the part of the company. It would involve substantial expenses, because they would have to locate company personnel throughout different parts of the country. I question whether any company of moderate size could accomplish this financially. This is where the financial consequences would be very substantial. It also would take a much longer period of time to develop an organization of that type.

Q. So that from the company's point— Is it your opinion, from the company's point of view, one of the advantages to the multi-level program is that in addition to selling the product, they are also increasing the sales force of the product to this marketing plan? [290] A. Certainly. It's an aggressive which allows for building up an effective marketing network in a very short period of time, shorter than you can do in the traditional ways. For a smaller manufacturer in a highly competitive marketplace, it is probably the only feasible way, in this day and age, you can do it. I don't think it's feasible today, to duplicate an Avon or Fuller Brush, which are really old-time companies, which traditionally got their start 50 years ago. I

Dirk Wassenaar—for Respondent—Cross

think it would be extremely difficult and it would require a lot of assets to follow the traditional approach, yes.

Q. So that to increase the number of distributors, the people in the program must, by the marketing plan, be able to offer some incentive to the prospective distributors. Is that correct? A. Yeah, compensation for services expected from them, yes.

Q. In addition, are there two different forms of compensation that could accrue to these prospective distributors? A. Yes. One is as a result of retail sales; and the other is in a form of wholesale sales, and has a compensation for training and developing people, yes.

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes
and says, that on the 16th day of April 1975 , at 2:30 o'clock

PM. he served the annexed Joint Appendix, in RE: GER-RO-MAR, INC. et al v.
FEDERAL TRADE COMMISSION No. 74-2343

upon W. Baldwin Ogden, Esq.

Esq(XX), Attorney(XX)

for Respondent

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government
of the United States and under the care of the Postmaster of the
City of New York at Village Station, New York, N. Y. 10014, enclosed
in a securely closed wrapper with the postage thereon prepaid, ad-
dressed to said attorney(XX) at (his/~~their~~) office

Federal Trade Commission, Washington, D.C. 20580

that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this

day of

16th April 1975

JOHN ALUSICK
Notary Public, State of New York
No. 31-4002133
Qualified in New York County
Commission Expires March 30, 1976

John Alusick

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

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and says, that on the 16th day of April 1975 , at 2:30 o'clock

P. M. he served the annexed Joint Appendix in RE: Ger-Ro-Mar-Inc.
et al v. Federal Trade Commission no. 74-2343

upon Hogan & Hartson

Esq(s) , Attorney(s)

for Amicus Curiae

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government
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City of New York at Village Station, New York, N. Y. 10014, enclosed
in a securely closed wrapper with the postage thereon prepaid, ad-
dressed to said attorney(s) at (his/their) office

815 Connecticut Ave. N. W. Washington, D.C. 20006

that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this

day of April, 1975

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1976

John Alusick

Joseph Boselli
John Alusick